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In The Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

vs.

MICHAEL J. HASON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

Michael Hason applied for licensure as a physician in California. Pursuant to its mission to protect the public health and safety, the Medical Board of California denied Hason's application. Hason claimed the Medical Board improperly denied his application on the basis of his mental illness, and he sued the Board in federal court, alleging a violation of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. The action was dismissed by the district court on grounds of sovereign immunity. However, reasoning that this Court's analysis in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) applied only to Title I of the ADA and not to actions arising under Title II of that Act, the Ninth Circuit reversed the district court's dismissal and held that California's denial of a medical license to Hason stated a cause of action for discrimination under Title II of the ADA. The questions presented are:

1. Does the Eleventh Amendment bar suit under Title II of the ADA against the California Medical Board for denial of a medical license based on the applicant's mental illness?

2. Does Title II of the ADA limit the authority of the California Medical Board to deny an applicant licensure as a physician because of the applicant's mental illness?

LIST OF PARTIES

Petitioner (Defendant and appellee in Court below):

Medical Board of California (an agency of the State of California)

Respondent (Plaintiff and appellant in Court below):

Michael J. Hason

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Medical Board of California ("Medical Board" or "Board") respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit that concluded that Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq., abrogated California's sovereign immunity under the Eleventh Amendment, and held that Title II of the Americans With Disabilities Act of 1990 applies to the licensing of physicians by the California Medical Board. In a decision made without the required abrogation analysis set forth by this Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Ninth Circuit held that the Eleventh Amendment does not bar suit against the Medical Board by an individual who claimed he was denied State licensure as a physician based upon his mental illness. The decision permits respondent to collaterally attack the Medical Board's administrative decision under Title II.

Unless this Honorable Court accepts this case for a writ review, an erroneous decision with significant national ramifications affecting the public health and safety will become precedent and California will be improperly subjected to suit in U.S. District Court without its consent in abrogation of the Eleventh Amendment.

OPINIONS BELOW

The original decision of the United States Court of Appeals for the Ninth Circuit, dated February 12, 2002, is set forth in the Appendix at App. 1 through App. 13, and is published at 279 F.3d 1167. The order denying a petition

for rehearing en banc, with a dissenting opinion signed by four judges of the Ninth Circuit, dated June 26, 2002, appears in the Appendix at App. 26 through App. 36, and is published at 294 F.3d 1166. The judgment of the United States District Court for the Central District of California, dated April 27, 2002, is set forth in Appendix at App. 14, and the February 1, 2000 Report and Recommendation of the Magistrate Judge, adopted by the judgment, is set forth in the Appendix at App. 17 through App. 25.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, denying the petition for rehearing en banc, was filed and entered on June 26, 2002, and is now final.

This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1254(1).

Given the Eleventh Amendment question presented in this petition, 28 U.S.C. § 2403(a) may apply. Copies of this petition for writ of certiorari are therefore being served on the Solicitor General of the United States. The General Docket of the Court of Appeals for the Ninth Circuit does not indicate whether the Ninth Circuit served the United States Attorney for the Central District of California notice that the appeal drew into question the constitutionality of 42 U.S.C. § 12132.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution states:

> "The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> "Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
>
> . . .
>
> "Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Title II of the Americans With Disabilities Act of 1990 provides in pertinent part:

> "The term 'public entity' means –
>
> (A) any State or local government;
>
> (B) any department, agency, special purpose district, or other instrumentality of a State . . . " 42 U.S.C. § 12131.

" . . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

STATEMENT

In March 1995, respondent Michael J. Hason applied for a license to practice medicine in the State of California. In August 1996, based upon the recommendation of an independent medical examiner who concluded that Hason was mentally ill, suffering from a history of depression and multiple drug dependency, the Medical Board of California denied Hason's application for licensure with the State. App. 38 through App. 39, App. 43 through App. 44 ¶ 1, 14-16.[1]

Hason sought administrative review of the Board's decision, and the denial was affirmed after hearing. App. 38, App 45, ¶¶ 1, 24. Hason did not seek state court review of the administrative decision, although such review was

[1] The Medical Board is an agency within the California Department of Consumers Affairs charged with administering the provisions of California's Medical Practice Act. Cal. Bus. & Prof. Code § 2000, et seq. The Board consists of a Division of Licensing and a Division of Medical Quality. Cal. Bus. & Prof. Code § 2003. The Board's Division of Licensing is responsible for the issuance of medical licenses. Cal. Bus. & Prof. Code § 2005. The Division of Medical Quality is charged with disciplining licensed physicians who violate the Medical Practice Act. Cal. Bus. & Prof. Code § 2004. The Board's primary purpose is protection of the public and ensuring the safe practice of medicine in the State. Cal. Bus. & Prof. Code § 2229.

available. *See* Cal. Govt. Code § 11504, Cal. Code Civ. Proc. § 1094.5. Instead, on April 21, 1999, Hason filed the present action in district court.

In district court, Hason alleged for the first time that the Board's denial of his application for licensure violated the United States Constitution; 42 U.S.C. § 1983; and Title II of the ADA, 42 U.S.C. § 12132. The complaint also alleged state tort claims, none of which are at issue in this proceeding. Hason named as defendants the Medical Board, and all of its members individually and as officers. The individual defendants were never served, did not appear in the district court, and are not parties to this petition.

On April 27, 2000, the district court issued a judgment dismissing the federal civil rights claims, the ADA claim, and the State tort law claims – all without leave to amend as to the Medical Board. App. 14. The order incorporated a February 1, 2000 report and recommendation of the Magistrate Judge, App. 17 through App. 25, concluding that the claims against the Medical Board and its officers for damages and injunctive relief were barred by the Eleventh Amendment. The report also concluded that Hason did not have a cause of action under Title II of the ADA with respect to alleged discrimination in the Board's decision to deny him a medical license on the basis of a mental illness.

Hason filed a timely notice of appeal. On February 12, 2002 the Ninth Circuit reversed. App. 3. The court held that (1) this Court's *Garrett* decision, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), did not overrule prior Ninth Circuit decisions, *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997) and *Dare*

v. California, 191 F.3d 1167 (9th Cir. 1999), which held that the State is subject to suit under the ADA despite the Eleventh Amendment; and (2) that Title II of the ADA applies to licensing activities of the Medical Board. App. 5 through App. 6, App. 10.[2]

The Board filed a petition for rehearing en banc, which was denied on June 26, 2002. Four circuit judges filed a strongly worded dissenting opinion, authored by Judge Diarmuid O'Scannlain, which invited a grant of certiorari and reversal by this Court. App. 26 through App. 36.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A SPLIT AMONG THE CIRCUITS OVER THE QUESTION WHETHER THE ELEVENTH AMENDMENT BARS SUIT AGAINST STATES FOR ALLEGED VIOLATION OF TITLE II OF THE ADA

A. The Ninth Circuit's Error in Refusing to Apply this Court's *Garrett* Analysis to Title II of the ADA Results in the Improper Abrogation of California's Sovereign Immunity

As the dissent from the denial of rehearing *en banc* emphasized, the *Hason* opinion does not deal in any

[2] The court upheld the dismissal of the individual defendants in their personal capacities, but held that they could be sued in their official capacities for future injunctive relief.

meaningful way with the Eleventh Amendment abrogation analysis required by *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (*Garrett*). In *Garrett*, this Court analyzed the Eleventh Amendment immunity with respect to Title I of the ADA, and articulated a framework for analyzing whether the sovereign immunity granted to the States under the Eleventh Amendment is abrogated by the enactment. In upholding Alabama's sovereign immunity against suit by a university employee, the Court emphasized that in order to abrogate state immunity, there must be an unambiguous expression of Congressional intent to do so, and a valid exercise of power under § 5 of the Fourteenth Amendment. This Court also explained that in order to invoke § 5 (and abrogate a State's immunity), the enactment must have been supported by Congressional findings of a history and pattern of state violations of the Fourteenth Amendment and, in addition, that the reach of the statute must be congruent and proportional to the constitutional wrong it seeks to remedy. *Garrett*, 531 U.S. at 365, 368.

The Ninth Circuit virtually ignored this Court's Eleventh Amendment analysis, relying instead on its own pre-*Garrett* decisions, *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997) and *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), and holding that, in Title II of the ADA, Congress validly abrogated Eleventh Amendment immunity. Neither of the circuit's pre-*Garrett* decisions included the type of meaningful analysis that *Garrett* made clear is required for determining whether the State retains its Eleventh Amendment immunities under the ADA. For example, in *Clark,* the Ninth Circuit concluded that since the purpose of the ADA was "to prohibit discrimination

against the disabled," 121 F.3d at 1270, and that "Congress explicitly found that persons with disabilities have suffered discrimination," the ADA was therefore "within the scope of appropriate legislation" under § 5 of the Fourteenth Amendment.[3] *Id.* *Clark* also contains no analysis of the legislative history of the ADA nor any substantive consideration of "congruence and proportionality." Nowhere does it address whether there was a history of discrimination by *the States* which the federal government sought to remedy, an important criterion under *Garrett.* See *Garrett*, 531 U.S. at 368. The analysis is completely inadequate under *Garrett.* Similarly, the *Dare* Court's reasoning was circular, acknowledging the "great deference" to be given to Congress' findings concerning protection of the disabled, but failing to reference state agencies as a target source of that discrimination. Nonetheless, the Ninth Circuit considered these cases definitive.

In holding that Title II reflected a valid abrogation of Eleventh Amendment immunity, the Ninth Circuit distinguished *Garrett* on the sole basis that *Garrett* dealt with Title I. But while the holding of *Garrett* did not squarely address Title II, this Court's reasoning most certainly applies. That is what the other circuits and the *Hason* dissent make most clear:

---

[3] As noted by the *Hason* dissent, the claims at issue in *Clark* were brought under Title II, but the Court treated the ADA as a whole, which casts further doubt on the continued validity of the opinion because in *Garrett*, the Court expressly refused to conflate the separate, detailed inquiries required for each of Title I and Title II. App. 30 through App. 31, n.2. (O'Scannlain, J., dissenting, citing *Garrett*, 531 U.S. at 360 n.1.)

> *This sort of blanket generalization, coupled this time with a generous helping of deference to Congress, stands in stark contrast to the provision-by-provision comparison with the constitutional baseline that Garrett requires.* App. 30. (emphasis added).

The very foundation of the *Hason* decision is thus built on precedents of sand. *Hason*, like *Dare* and *Clark* before it, fails to analyze (1) whether Title II was properly enacted based upon an "identified history and pattern" of unconstitutional discrimination *by the States* against the disabled and (2) whether the remedial provisions of Title II are "congruent and proportional to any constitutional violation."

The four judges criticizing the denial of rehearing *en banc* recognized the manifest inadequacy of the court's opinion and essentially invited the Board to seek review by this Court:

> [T]oday's opinion blithely ignores recent Supreme Court precedent and follows superseded cases of our court instead. It bears repeating: This decision cannot possibly be right. See *Vinson v. Thomas*, 288 F.3d 1145, 1157-58 (9th Cir. 2002) (O'Scannlain, J., dissenting); *see also Douglas v. Cal. Dep't of Youth Auth.*, 285 F.3d 1226, 1226-27 (9th Cir. 2002) (O'Scannlain, J., dissenting from denial of rehearing en banc). Because *Hason* all but invites a grant of certiorari and reversal for putting us out of step with the Supreme Court and *creating a split with every other circuit to have considered the issue*, I must dissent from the order denying en banc rehearing." App. 27 through App. 28. (O'Scannlain, J., dissenting; emphasis added).

B. There Is a Clear Split among the Circuits over the Question Whether, in Title II of the ADA, Congress Has Validly Abrogated State Sovereign Immunity under the Eleventh Amendment

The Ninth Circuit is the *only circuit* to have unequivocally refused to apply *Garrett* to a Title II ADA claim against a State agency. In fact, two Circuits have recently overruled their own pre-*Garrett* decisions: *Reickenbacker v. Foster*, 274 F.3d 974, 981 (5th Cir. 2001) (concluding that *Garrett* "effectively overruled" prior circuit precedent holding that Title II validly abrogated State sovereign immunity) and *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001), cert. denied, 122 S.Ct. 1961, 152 L.Ed.2d 1031 (2002) (holding that the circuit's prior decision on Title I was effectively overruled by *Garrett* and that, under the *Garrett* analysis, Title II was also not a valid abrogation of the Eleventh Amendment).

Every other circuit considering the issue has either held that in Title II Congress did not validly abrogate Eleventh Amendment immunity, or that such immunity is still available under certain conditions, all of which are applicable here. See, e.g., *Klingler v. Dir., Dep't of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002) (affirming pre-*Garrett* decision holding that in Title II Congress did not validly abrogate state sovereign immunity); *Erickson v. Bd. of Governors of State Cols. and Univs.*, 207 F.3d 945, 948, 951-52 (7th Cir. 2000) (a pre-*Garrett* decision concluding that "the ADA does not enforce the Fourteenth Amendment," as "the legislative findings in [the ADA] contain not a word about state governments," and that "nothing" in the ADA legislative findings or debates "shows or even asserts" that state governments engaged in irrational

discrimination that would invoke the Fourteenth Amendment); *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002) (holding Title II is constitutional to the extent "that Title is applied to cases in which a court identifies a constitutional violation by the state," e.g. Eighth Amendment prohibition of "cruel and unusual punishment"); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 812, 815-16 (6th Cir. 2002) (en banc) (agreeing that Title II is not a valid abrogation of sovereign immunity when Congress is enforcing the Equal Protection Clause, but holding that it is permissible when enforcing the Due Process Clause); *Garcia v. S.U.N.Y. Health Sciences. Center*, 280 F.3d 98, 110-12 (2d Cir. 2001) (holding that Title II actions may only be brought against States if the plaintiff can establish that the "violation was motivated by discriminatory animus or ill will based on the plaintiff's disability"); and *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698, 707 (4th Cir. 1999) (holding that a regulation enacted pursuant to Title II did not validly abrogate state sovereign immunity.)

II. THE AMERICANS WITH DISABILITIES ACT DOES NOT LIMIT CALIFORNIA'S AUTHORITY TO DENY A MEDICAL LICENSE ON THE BASIS OF AN APPLICANT'S MENTAL ILLNESS

The Ninth Circuit held that issuance of license to practice medicine is a "service, program or activity" within the meaning of Title II of the ADA, 42 U.S.C. §§ 12131(2), 12132. App. 9 through App. 10. The decision is unprecedented among the circuits and, the Board contends, is wrong as a matter of law. Indeed, in a case remarkably

similar to this one, a district court in the Sixth Circuit came to precisely the opposite conclusion. The Michigan district court held that the ADA did not apply to the state medical board's decision to revoke the medical license of a physician with a bipolar disorder. *Alexander v. Margolis*, 921 F.Supp. 482 (W.D. Mich. 1995), *aff'd*, 98 F.3d 1341 (6th Cir. 1996). The district court reasoned that:

> Considering the text of section 12132(2), it is questionable whether the Board's duty to license physicians can be characterized as a "service" being denied to plaintiff or whether the Board's refusal to reinstate his license denies him participation in "programs or activities provided" by a state entity. *The Board of Medicine is, if anything, a service, program or activity provided for the public's benefit and safety, not for the benefit of any given individual who does not meet the state's requirements for practicing medicine.*

Alexander v. Margolis, 921 F.Supp. at 488 (emphasis added). The court in *Alexander* added:

> The very nature of the police powers exercised by state boards of medicine require the state to discriminate on the basis of, among other considerations, a mental condition harmful to the public's safety. By the very nature of the practice of medicine, given the physician's necessary independence to "practice" his art . . . [t]he Board cannot exercise its duty without the discretion to consider the impact of a mental disability upon one's ability to practice with reasonable skill and safety. The danger of irreparable harm to the

> public is too great to deny the Board such discretion. To require otherwise is unreasonable.

Id. (emphasis added).

Alexander correctly states the law, recognizing inherent state power to regulate the practice of medicine for the public health and safety. *Alexander* is also consistent with the First Circuit's reasoning that, "[i]n determining whether 'essential eligibility requirements' are met [for purposes of 42 U.S.C. § 12131(2)], a public entity properly may consider whether an applicant with a disability poses a direct threat to the health and safety of others." *Theriault v. Flynn*, 162 F.3d 46, 48 (1st Cir. 1998).

The very purpose of California's Medical Board is to protect the public, not to provide a "service" for the benefit of applicants. The California Legislature has repeatedly emphasized that the purpose of the Board is to "protect the health, safety, and welfare of the people of California against incompetent or impaired physicians." Cal. Bus. & Prof. Code § 2220. "Protection of the public shall be the highest priority." Cal. Bus. & Prof. Code § 2229. California law includes a comprehensive statutory scheme for addressing physicians who are mentally ill or whose physical illness affects their competency, Cal. Bus. & Prof. Code § 820, et. seq., and California provides full judicial review of licensing decisions, Cal. Code of Civil Proc. § 1094.5, Cal. Bus. & Prof. Code § 2337. As a matter of state policy, when physician rehabilitation and public protection are inconsistent, public protection is paramount. Cal. Bus. & Prof. Code § 2229(c).

Nothing in the statutory scheme of the ADA suggests that, by enacting Title II, Congress intended to intrude upon licensing of physicians pursuant to inherent state

police powers. Nor does it show an intent to permit circumvention of the state's judicial review process available to challenge medical board licensing decisions. In *Bowen v. American Hospital Assn.*, 476 U.S. 610 (1986), this Court held that anti-discrimination laws were not meant to intrude upon medically related decisions. The Court concluded that the regulations governing the care to be provided to severely disabled infants were not authorized by the Rehabilitation Act of 1973, and observed that "Congress has failed to indicate, either in the statute or in the legislative history, that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance." *Id.* at 643. Insofar as the ADA is construed in the same manner as the Rehabilitation Act of 1973, see *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832, n.3. (9th Cir. 1995), the rationale articulated in *Bowen* – that anti-discrimination laws should not intrude on medically related decisions – equally applies herein. The ADA was not intended to be used as a vehicle for "federal superintendence" of decisions determining the fitness of individuals for licensure as physicians.

CONCLUSION

For the reasons stated, the Medical Board of California respectfully requests that its petition for writ of certiorari be granted.

Dated: September 23, 2002

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. HASON, M.D.,	)	No. 00-55784
Plaintiff-Appellant,	)	DC No.
	)	CV-99-04264-AHM
v.	)	
MEDICAL BOARD OF CALIFORNIA; DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA; ARLENE ADAMS, the Director of the Department of Consumer Affairs of the State of California; NEIL FIPPIN, individually, & as the Manager, Licensing Program of the Medical Board of the State of California; MELINDA ACOSTA, individually & as an official of the Medical Board of the State of D.C. No. California; RON JOSEPH, individually & as Executive Director of the Medical Board of the State of California & as Director of the Department of Consumer Affairs of the State of California; BRUCE HASENKAMP, individually & as President of the Division of Licensing of the Medical Board of the State of California; IRA LUBELL, M.D., individually & as President of the Division of Medical Quality of the Medical	)	

Board of the State of California; CAROLE H. HURVITZ; ANABEL A. IMBERT; RAQUEL D. ARIAS, Dr.; KLEA D. BERTAKIS, Dr.; JACK BRUNER, DR.; DANIEL LIVINGSTON; KAREN MCELLIOT; ALAN E. SHUMACHER, Dr.; KIP S. SKIDMORE, individually & as Member of the Medical Board of the State of California's Division of Medical Quality; THOMAS A. JOAS, Dr.; KAREN MCELLIOTT, individually & as Officer of the Medical Board of the State of California & its Division of Licensing; BERNARD ALPERT, individually & as Officer of the Medical Board of the State of California & its Division of Licensing; MICHAEL I. SIDLEY, individually & as Executive of the Medical Board of the State of California's Division of Licensing; RAJA TOKE, Dr., individually & as Executive of the Medical Board of the State of California's Division of Licensing; THE STATE OF CALIFORNIA & SENIOR INVESTIGATOR,

Defendants-Appellees.

Appeal from the United States District Court
For the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted November 6, 2001 –
Pasadena, California

Filed Feb. 12, 2002

Before: Alfred T. Goodwin, J. Clifford Wallace and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Goodwin

COUNSEL

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, California, for the plaintiff-appellant. Joel A. Davis, Supervising Deputy Attorney General, Los Angeles, California, for the defendants-appellees.

OPINION

GOODWIN, Circuit Judge:

Dr. Michael J. Hason appeals the dismissal of his pro se complaint alleging discrimination based on disability in violation of the United States Constitution and Title II of the Americans with Disabilities Act ["ADA"]. We have jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons that follow we reverse and remand.

BACKGROUND

In March of 1995, Michael J. Hason, M.D., applied for a license to practice medicine in the state of California. In April of 1998, the California Medical Board denied, for reasons of mental illness, Dr. Hason's application for a medical license. Dr. Hason subsequently filed a pro se

complaint in federal district court alleging violations of his rights under the United States Constitution (brought pursuant to 42 U.S.C. § 1983) and Title II of the ADA, 42 U.S.C. § 12132. The complaint also alleged state law tort claims which are not at issue on this appeal.

Dr. Hason's complaint named as defendants The Medical Board of the State of California ["The Medical Board"], the Department of Consumer Affairs of the State of California and its director, and various other individuals that were either members of or otherwise affiliated with the Medical Board (in both their official and personal capacities). Dr. Hason sought both damages and injunctive relief.

On April 25, 2000, the District Court dismissed Dr. Hason's complaint without prejudice as to the individual defendants in their personal capacities, and with prejudice as to the two named state agencies and the individual defendants in their official capacities. The Report and Recommendation of the United States Magistrate Judge, which was affirmed in its entirety by the District Court, stated three reasons for dismissing Dr. Hason's complaint. First, the Report concluded that Dr. Hason's claims were barred by the Eleventh Amendment. Second, the Report concluded that Dr. Hason failed to state a claim upon which relief could be granted under Title II of the ADA. Third, the Report concluded that Dr. Hason's claims against the individual defendants in their personal capacities should be dismissed for failure to prosecute.

We review de novo the District Court's dismissal of a complaint for failure to state a claim upon which relief can be granted. *See NL Indus. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986).

DISCUSSION

I. Sovereign Immunity

We begin by considering whether the District Court erred in holding that Dr. Hason's claims were barred by the Eleventh Amendment. The Eleventh Amendment prohibits a private party from suing a nonconsenting state or its agencies in federal court.[1] *See Board of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 363 (2001); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 72-73 (2000); *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54 (1996); *Hans v. Louisiana,* 134 U.S. 1, 15 (1890). The Eleventh Amendment does not, however, prevent a private litigant from suing a state or its agencies in federal court where Congress has abrogated state sovereign immunity acting pursuant to section 5 of the Fourteenth Amendment. We have previously held that in enacting Title II of the ADA Congress validly abrogated state sovereign immunity, and thus states and their agencies may be sued pursuant to Title II. *See Dare v. California,* 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark v. California,* 123 F.3d 1267, 1270-71 (9th Cir. 1997); *see also Patricia v. Lemahieu,* 141 F.Supp.2d 1243, 1248 (D. Haw. 2001) (observing that the Ninth Circuit has twice rejected the argument that Congress exceeded its constitutional authority in abrogating state sovereign immunity pursuant to Title II of the ADA).

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[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Appellees contend, however, that the Supreme Court's recent decision in *Garrett* overrules both *Clark* and *Dare*. In *Garrett*, the Court held that Congress did not validly abrogate state sovereign immunity in enacting *Title I* of the ADA. *See Garrett*, 531 U.S. at 360. The *Garrett* Court expressly declined to decide whether Congress validly abrogated state sovereign immunity in enacting *Title II* of the ADA. *See id.* at 360 n. 1. We therefore conclude that *Garrett* does not overrule either *Clark* or *Dare*, and that the Eleventh Amendment does not bar Dr. Hason's Title II claims.

The District Court also erred in its treatment of Dr. Hason's federal civil rights claims, brought pursuant to 42 U.S.C. § 1983, against the various individual state officials. The District Court held that Dr. Hason's section 1983 claims were barred by the Eleventh Amendment. In so holding, the District Court failed to recognize the long-established exception to Eleventh Amendment immunity carved out by *Ex Parte Young*, 209 U.S. 123 (1908). The *Ex Parte Young* doctrine provides that the Eleventh Amendment does not bar suits for prospective injunctive relief brought against state officers "in their official capacities, to enjoin an alleged ongoing violation of federal law." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997); *Seminole Tribe of Florida*, 517 U.S. at 73; *Children's Hosp. and Health Ctr. v. Belshe*, 188 F.3d 1090, 1095 (9th Cir. 1999); *Armstrong v. Wilson*, 124 F.3d 1019, 1025 (9th Cir. 1997). Dr. Hason's complaint clearly seeks prospective injunctive relief to enjoin the individual defendants' refusal to issue Dr. Hason a medical license. Thus, under the doctrine of *Ex Parte Young*, Dr. Hason's section 1983 claims seeking

prospective injunctive relief from the individual defendants are not barred by the Eleventh Amendment. The District Court erred in concluding otherwise.

II. Title II of the ADA

We next consider the District Court's dismissal of Dr. Hason's complaint for failure to state a claim for which relief can be granted under Title II of the ADA. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The District Court dismissed Dr. Hason's complaint based on the magistrate judge's two-fold conclusion that (1) the denial of a medical license cannot be challenged under Title II of the ADA because a medical license does not constitute "services, programs, or activities of a public entity" and (2) Dr. Hason is not a "qualified individual with a disability" within the meaning of Title II of the ADA.

With respect to the first of the two above grounds for dismissal, Dr. Hason contends that his complaint properly states a claim because a medical license constitutes "services, programs, or activities of a public entity" under Title II. Dr. Hason argues that the magistrate judge's interpretation of the phrase "services, programs, or activities" to exclude medical licensing is at odds with both the plain language and remedial goals of Title II.

[2] In response, Appellees argue that Title II was not intended to apply to professional licensing. Appellees rely primarily on *Zimmerman v. Oregon Department of Justice,*

170 F.3d 1169 (9th Cir. 1999). In *Zimmerman,* the plaintiff brought an action against his employer alleging that the employer's practices discriminated against him in violation of Title II of the ADA. This Court affirmed the district court's holding that Title II of the ADA does not apply to employment. *See id.* at 1184. In doing so, we conducted a thorough examination of both the wording of Title II and the structure of the ADA, concluding that Congress intended for Title II to apply only to the "outputs" of a public agency, not to "inputs" such as employment. *See id.* at 1173-79.[2]

Relying on *Zimmerman,* Appellees contend that medical licensing does not fall within the scope of Title II because medical licensing is not an "output" of a public agency. According to Appellees, medical licensing is not an "output" because it is a service provided for the benefit of the *public at large,* not for the benefit of *applicants* seeking to obtain medical licenses. *See Alexander v. Margolis,* 921 F.Supp. 482, 488 (W.D. Mich. 1995) (observing that "[t]he Board of Medicine is, if anything, a service, program or activity provided for the public's benefit and safety, not

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[2] The *Zimmerman* court illuminated the "input"/"output" distinction with the following example: "[C]onsider how a member of the public would answer the question, 'What are the services, programs, and activities of the Parks Department in which you want to participate, or whose benefits you seek to receive?' The individual might answer, 'I want to participate in the Wednesday night basketball league, or find out about the free children's programs for the summer months.' The individual would not logically answer, 'I want to go to work for the Parks Department.'" *Zimmerman,* 170 F.3d at 1174. The *Zimmerman* court considered both the basketball league and the children's programs to be "outputs," and it considered an individual going to work for the Parks Department to be an "input."

for the benefit of any given individual who does not meet the state's requirements for practicing medicine").

[3] We are not persuaded by Appellees' argument. Viewed in the light of the *Zimmerman* framework, medical licensing is an output of a public agency, not an input such as employment. The act of licensing involves the Medical Board (i.e. a "public agency") providing a license (i.e. providing a "service") to an applicant for a medical license. Although medical licensing does occur within the employment context, medical licensing is not equivalent to employment. The Medical Board does not make employment decisions, and the Board's grant of a license is not tantamount to a promise or guarantee of employment as a physician.

Furthermore, the magistrate judge's narrow construction of the phrase "services, programs, or activities" is at odds with the remedial goals underlying the ADA. *See Arnold v. United Parcel Serv., Inc.,* 136 F.3d 854, 861 (1st Cir. 1998) (observing that the ADA is a remedial statute which should be construed broadly); *Kornblau v. Dade County,* 86 F.3d 193, 194 (11th Cir. 1996) (same); *see also Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967) (recognizing the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"). Courts must construe the language of the ADA broadly in order to effectively implement the ADA's fundamental purpose of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Arnold,* 136 F.3d at 861 (quoting 42 U.S.C. § 12101(b)(1) (1994)). In fact, this court has already capitalized upon the opportunity to construe broadly the language of Title II. In *Lee v. City of Los Angeles* we stated in the Title II context that "the

ADA's broad language brings within its scope anything a public entity does." *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir. 2001) (citation and internal quotations omitted). Medical licensing is without a doubt something that the Medical Board "does." As such, we conclude that medical licensing clearly falls within the scope of Title II.[3]

The second major reason given by the magistrate judge for dismissing Dr. Hason's Title II claims was that Dr. Hason was not a "qualified individual with a disability" within the meaning of Title II of the ADA. Title II defines this requirement as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers,

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[3] Dr. Hason also argues that, regardless of whether a medical license constitutes a service, program, or activity of a public entity, his complaint states a claim under Title II of the ADA. As noted above, Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, *or be subjected to discrimination by any such entity.*" 42 U.S.C. § 12132 (emphasis added). Dr. Hason construes the second clause of Title II (i.e. "or be subjected to discrimination by any such entity") as providing a blanket cause of action for any type of discrimination by a public entity, including discrimination not related to the services, programs or activities of a public entity. Because we conclude that medical licensing is a service, program, or activity of a public entity within the meaning of Title II, we need not reach the merits of Dr. Hason's argument. For the sake of clarity, however, we note that in *Zimmerman* we ruled out Dr. Hason's proposed construction of the second clause of Title II. *See Zimmerman,* 170 F.3d at 1176 (concluding that the second clause of Title II, like the first, prohibits discrimination only in a public entity's outputs).

> or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Dr. Hason argues that the District Court erred in accepting the magistrate judge's conclusion because the question of whether Dr. Hason is a qualified individual with a disability is a factual question that should not be resolved on a 12(b)(6) motion to dismiss. In response, Appellees contend that Dr. Hason is not a "qualified individual with a disability" because Dr. Hason admits in his pleadings that he suffers from a mental disability.

Although at a later stage in the proceedings Appellees might demonstrate that Dr. Hason is not a qualified individual with a disability, they have not yet done so. Appellees are correct that Dr. Hason states in his complaint that he suffers from a mental disability. Dr. Hason's complaint also alleges, however, that by the time of the Medical Board's decision he had received treatment for his disability and was capable of practicing medicine. Accepting these allegations as true and construing them in the light most favorable to Dr. Hason, we conclude that Dr. Hason adequately alleges that he is a qualified individual with a disability. *See Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1989) (stating that, in reviewing district court's dismissal for failure to state a claim pursuant to Rule 12(b)(6), appellate court accepts plaintiff's allegations as true and construes complaint in light most favorable to plaintiff).

For the foregoing reasons, we conclude that Dr. Hason states claims for which relief can be granted under Title II

of the ADA. The District Court erred in dismissing his complaint pursuant to Rule 12(b)(6).

III. Failure to Prosecute

Dr. Hason next argues that the District Court abused its discretion in dismissing his claims, for failure to prosecute, against the individual defendants in their personal capacities. In recommending that Appellant's suit be dismissed for failure to prosecute, the magistrate judge relied on Federal Rule of Civil Procedure 4(m). Rule 4(m) provides that, if process is not served within 120 days after the filing of the complaint, and the plaintiff cannot show good cause why service was not made within that time, the action is subject to dismissal without prejudice upon the court's own initiative with notice to the plaintiff. The magistrate judge noted that Dr. Hason failed to effectuate service of process on the named individual defendants within 120 days after the filing of his complaint. Dr. Hason also failed to respond to an order to show cause why service had not been made within the 120 day period.

Dr. Hason does not dispute these facts. Rather, he argues that he had determined that the individual defendants were not liable and that he wanted them to be dismissed as defendants. He assumed that he was furthering this goal and helping the court by not responding to the order to show cause. However, when it became clear that the state agencies were going to be dismissed as defendants, Dr. Hason decided that he no longer wanted the individual defendants to be dismissed. Dr. Hason's argument lacks merit, and we conclude that the District Court did not abuse its discretion in dismissing, for failure

to prosecute, Dr. Hason's claims against the individual defendants in their personal capacities.

IV. Conclusion

In conclusion, we hold that (1) Dr. Hason's Title II claims are not barred by the Eleventh Amendment; (2) Dr. Hason's section 1983 claims seeking prospective injunctive relief against the individual defendants in their official capacities are not barred by the Eleventh Amendment; (3) Dr. Hason states valid claims under Title II of the ADA; and (4) the District Court did not abuse its discretion in dismissing for failure to prosecute Dr. Hason's claims against the individual defendants in their personal capacities.

We accordingly remand to the District Court for consideration of the merits of Dr. Hason's ADA claims. The District Court did not rule on the merits of Dr. Hason's section 1983 claims, so they too must be remanded.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, M.D., Plaintiff, vs. THE MEDICAL BOARD OF THE STATE OF CALIFORNIA, et al., Defendants.	Case No.: CV 99-04264-AHM (RNB) **JUDGMENT** (Entered April 27, 2000)

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that this action is dismissed without prejudice as to the individual defendants in their individual capacities, and with prejudice as to the two named state agencies and the individual defendants in their official capacities.

DATED: April 25, 2000

/s/ A. Howard Matz
A. HOWARD MATZ
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, M.D., Plaintiff, v. THE MEDICAL BOARD OF THE STATE OF CALIFORNIA, et al., Defendants.	Case No.: CV 99-04264-AHM (RNB) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (Filed Mar. 31, 2000)

Pursuant to 28 U.S.C. § 636, the Court has conducted a review of all the records and files of this case, including the Report and Recommendation of the United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a *de novo* determination of those portions of the Report and recommendation to which objection has been made, the Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

IT IS ORDERED that: (1) plaintiff's federal civil rights claims against the two named state agencies and the individual defendants in their official capacities are dismissed without leave to amend; (2) plaintiff's ADA claim is dismissed without leave to amend; and (3) plaintiff's state law tort claims are dismissed without leave to amend.

March 31, 2000

/s/ A. Howard Matz
A. HOWARD MATZ
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, M.D., Plaintiff, vs. THE MEDICAL BOARD OF THE STATE OF CALIFORNIA, et al., Defendants.	Case No. CV 99-04264-AHM (RNB) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable A. Howard Matz, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court or [sic] the Central District of California.

PROCEEDINGS

Plaintiff filed this action *pro per* on April 21, 1999, purporting to allege federal claims for violations of his federal constitutional rights and the Americans with Disabilities Act ("ADA"), as well as state law tort claims. Named as defendants are The Medical Board of the State of California (the "Medical Board"), the Department of Consumer Affairs of the State of California (the "Consumer Affairs Department") and its director, and various other individuals who are alleged to be either members of or otherwise affiliated with the Medical Board (in both their official and individual capacities).

Like two other actions filed by plaintiff in this Court, this action arises out of the Medical Board's denial of plaintiff's application for a medical license.

On December 23, 1999, the matter was transferred from the calendar of Magistrate Judge Nagle to the calendar of Magistrate Judge Block.

Now pending before the Court and ready for decision is a Motion to Dismiss brought by the State of California on behalf of the Medical Board and the Consumer Affairs Department. For the reasons discussed hereafter, the Court recommends that plaintiff's federal civil rights claims against the two named state agencies and the individual defendants in their official capacities be dismissed without leave to amend, that plaintiff's ADA claim be dismissed without leave to amend, and that plaintiff's state law tort claims be dismissed without leave to amend.

STANDARD OF REVIEW

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1988). Plaintiff's allegations of material fact must be taken as true and construed in the light most favorable to plaintiff. *See Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1989). Since plaintiff is appearing *pro se,* the Court must construe the allegations of the complaint liberally and must afford plaintiff the benefit of any doubt. *See Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988).

DISCUSSION

A. Plaintiff is unable to state a claim against the State of California (or the two named state agencies) or any of the individual defendants in their official capacities for violation of his federal civil rights.

In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), the Supreme Court held that states, state agencies, and state officials sued in their official capacities[1] are not persons subject to civil rights suits under 42 U.S.C. § 1983. *See* 491 U.S. at 64-66. Further, the Eleventh Amendment bars federal jurisdiction over suits by individuals against a State and its instrumentalities, unless either the State consents to waive its sovereign immunity or Congress abrogates it. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99-100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). To overcome this Eleventh Amendment bar, the State's consent or Congress' intent must be "unequivocally expressed." *Pennhurst,* 465 U.S. at 99. While California has consented to be sued in its own courts pursuant to the California Tort Claims act, such consent does not constitute consent to suit in federal court. *See BV Engineering v. Univ. of Cal., Los Angeles,* 858 F.2d 1394, 1396 (9th Cir. 1988), *cert. denied,* 489

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[1] The Supreme Court has held that an "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham,* 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); *see also Brandon v. Holt*, 469 U.S. 464, 471-72, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985); *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). Such a suit "is *not* a suit against the official personally, for the real party in interest is the entity." *Graham, supra.*

U.S. 1090 (1989); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) (holding that Art. III, § 5 of the California Constitution did not constitute a waiver of California's Eleventh Amendment immunity). Furthermore, Congress has not abrogated State sovereign immunity against suits under 42 U.S.C. § 1983.

The Eleventh Amendment not only bars plaintiff's federal civil rights claims against the State of California/Medical Board/Consumer Affairs Department and the named individuals in their official capacities to the extent that plaintiff is seeking monetary damages from them, but also plaintiff's federal civil rights claims against those defendants to the extent that plaintiff is seeking injunctive relief. *Pennhurst*, 465 U.S. at 100 ("This jurisdictional bar applies regardless of the nature of the relief sought."); *see also Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (per curiam) (Eleventh Amendment bars claim for injunctive relief against Alabama and its Board of Corrections).

Moreover, plaintiff's failure to allege facts sufficient to state a federal civil rights claim against the State of California/Medical Board/Consumer Affairs Department and the named individuals in their official capacities is not a pleading deficiency capable of being remedied in an amended pleading.

B. Plaintiff is unable to state a claim against defendants for violation of the ADA.

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded

from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *See* 42 U.S.C. § 12132(2); *Weinreich v. Los Angeles County Metropolitan Transportation Authority*, 114 F.3d 976, 978 (9th Cir.), *cert. denied*, 118 S. Ct. 423 (1997); *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996). 42 U.S.C. § 12131(2) defines "qualified individual with a disability" in pertinent part as "an individual with a disability who, with or without reasonable modifications to rules, policies or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

The gravamen of plaintiff's ADA claim is that the State of California violated the ADA when it denied his medical license application on account of his mental disability. (Plaintiff acknowledges in his opposition that he "has suffered recurring depressions that have at times significantly impaired his ability to function in major activities of life.").

Plaintiff contends in his opposition that the Eleventh Amendment is not a bar to an action under the ADA. However, even assuming *arguendo* that plaintiff is correct,[2] plaintiff still has failed to cite any authority for the proposition that a medical license even qualifies as "services, programs, or activities of a public entity' within the meaning of the ADA. As the district court

[2] It appears that, by the end of the current term, the United States Supreme Court may hold otherwise.

observed in *Alexander v. Margolis*, 921 F. Supp. 482 (W.D. Mich. 1995), where the plaintiff's medical license had been revoked on account of plaintiff's mental condition:

> "Considering the test of section 12132(2), it is questionable whether the Board's duty to license physicians can be characterized as a 'service' being denied to plaintiff or whether the Board's refusal to reinstate his license denies him participation in 'programs or activities provided' by a state entity. The Board of Medicine is, if anything, a service, program or activity provided for the public's benefit and safety, not for the benefit of any given individual who does not meet the state's requirements for practicing medicine." 921 F. Supp. at 488.

In any event, even if a medical license qualifies as "services, programs, or activities of a public entity' within the meaning of the ADA, the Court concurs with the conclusion of the *Alexander* court that a medical license applicant who suffers from a mental disability is not a "qualified individual with a disability" under the ADA:

> "The very nature of the police powers exercised by state boards of medicine require the state to discriminate on the basis of, among other considerations, a mental condition harmful to the public's safety. By the very nature of the practice of medicine, given the physician's necessary independence to 'practice' his art, no reasonable modification can be made to a policy of restricting medical practice to those without evidence of mental disabilities. . . . The Board cannot exercise its duty without the discretion

> to consider the impact of a mental disability upon one's ability to practice with reasonable skill and safety. The danger of irreparable harm to the public is too great to deny the Board such discretion. To require otherwise is unreasonable." 921 F. Supp. at 488.

Moreover, it does not appear to the Court that plaintiff's failure to allege facts sufficient to state an ADA claim is a pleading deficiency capable of being remedied in an amended pleading.

C. Plaintiff's state law tort claims are barred by plaintiff's failure to comply with the claims presentation requirements.

To the extent that plaintiff purports to be alleging state law tort claims, his claims are subject to the provisions of the California Tort Claims Act (the "Act"). *See* Cal. Govt. Code §§ 900.6 (defining "State" to include "any office, officer, department, division, bureau, board, commission or agency of the State"), 905.2 (requiring tort claims for money or damages against the State to be presented in accordance with the provisions of the Act). Under Cal. Govt. Code § 911.2, it was incumbent on plaintiff to present his state tort claims against the state agencies and the individual defendants to the State Board of Control (*see* Cal. Govt. Code § 900.2) not later than six months after the accrual of his causes of action. In neither the Complaint nor his opposition to the Motion to Dismiss does plaintiff allege timely presentation of his state tort claims in accordance with Cal. Govt. Code § 911.2.

Since it appears from the face of the Complaint that plaintiff's state tort claims accrued no later than April 24, 1998, when plaintiff alleges that the Order affirming the denial of his license application took effect, not only is it now too late for plaintiff to present his claim, but it also is too late for him to seek leave to present a late claim. *See* Cal. Govt. Code § 911.4 (written application to present a late claim must be presented within a reasonable period of time not to exceed one year after the accrual of the cause of action). Therefore, under California law, plaintiff's state tort claims against defendants are now barred. *See, e.g., Boxall v. Sequoia Union High School Dist.,* 464 F. Supp. 1104, 1113 (N.D. Cal. 1979); *Fisher v. Pickens,* 225 Cal. App. 3d 708, 718, 275 Cal. Rptr. 487 (1990). Thus, plaintiff's failure to allege facts sufficient [to] state any state tort claims also is a pleading deficiency incapable of being remedies in an amended complaint.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) dismissing plaintiff's federal civil rights claims against the two named state agencies and the individual defendants in their official capacities without leave to amend; (3) dismissing plaintiff's ADA claim without leave to amend; and (4) dismissing plaintiff's state law tort claims without leave to amend.

DATED: February 1, 2000

/s/ Robert N. Block
ROBERT N. BLOCK
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. HASON, M.D.,

Plaintiff-Appellant,

v.

MEDICAL BOARD OF CALIFORNIA; DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA; ARLENE ADAMS, the Director of the Department of Consumer Affairs of the State of California; NEIL FIPPIN, individually, & as the Manager, Licensing Program of the Medical Board of the State of California; MELINDA ACOSTA, individually & as an official of the Medical Board of the State of California; RON JOSEPH, individually & as Executive Director of the Medical Board of the State of California & as Director of the Department of Consumer Affairs of the State of California; BRUCE HASENKAMP, individually & as President of the Division of Licensing of the Medical Board of the State of California; IRA LUBELL, M.D., individually & as President of the Division of Medical Quality of the Medical Board of the State of California; CAROLE H. HURVITZ; ANABEL A. IMBERT; RAQUEL D. ARIAS, Dr.; KLEA D. BERTAKIS, Dr.; JACK BRUNER, DR.; DANIEL LIVINGSTON; KAREN MCELLIOT; ALAN E. SCHUMACHER, Dr.; KIP S. SKIDMORE, individually & as Member of the Medical Board of the State of California's Division of Medical Quality; THOMAS A. JOAS, Dr.; KAREN MCELLIOTT, individually & as Officer of the Medical Board of the State of California & its Division of Licensing; BERNARD ALPERT, individually & as Officer of the Medical Board of the State of California & its Division of Licensing; MICHAEL I. SIDLEY, individually & as Executive of the Medical Board of the State of California's Division of

Licensing; RAJA TOKE, Dr., individually & as Executive of the Medical Board of the State of California's Division of Licensing; THE STATE OF CALIFORNIA & SENIOR INVESTIGATOR,
Defendants-Appellees.

No. 00-55980.

Filed June 26, 2002
Before: Alfred T. Goodwin, J. Clifford Wallace and Sidney R. Thomas, Circuit Judges.

Dissent by Judge O'Scannlain

ORDER

Judge Thomas has voted to deny the petition for rehearing en banc, and Judges Goodwin and Wallace recommended denial.

The full court has been advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

O'SCANNLAIN, Circuit Judge, with whom Circuit Judges KOZINSKI, T.G. NELSON, and KLEINFELD join, dissenting from denial of rehearing en banc.

Stubbornly extending enforcement of Title II of the Americans with Disabilities Act ("ADA") against the Nine Western States, today's opinion blithely ignores recent Supreme Court precedent and follows superseded cases of our court instead. It bears repeating: This decision cannot possibly ~~be right~~. *See Vinson v. Thomas,* 288 F.3d 1145, 1157-58 (9th Cir. 2002) (O'Scannlain, J., dissenting); *see*

also Douglas v. Cal. Dep't of Youth Auth., 285 F.3d 1226, 1226-27 (9th Cir. 2002) (O'Scannlain, J., dissenting from denial of rehearing en banc). Because *Hason* all but invites a grant of certiorari and reversal for putting us out of step with the Supreme Court *and creating a split with every other circuit to have considered the issue,* I must dissent from the order denying en banc rehearing.

I

This opinion reaffirms two prior decisions of this court – *Dare v. California,* 191 F.3d 1167 (9th Cir. 1999), and *Clark v. California,* 123 F.3d 1267 (9th Cir. 1997) – which concluded that Title II validly abrogated the sovereign immunity of the several States. *See Hason v. Med. Bd.*, 279 F.3d 1167, 1170-71 (9th Cir. 2002). In so doing, however, it refuses to deal in a meaningful way with intervening Supreme Court precedent, specifically *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001). This, in a nutshell, is where *Hason* goes astray.

A bit of history is required to see clearly the misstep that this opinion takes.

A

It is beyond dispute that recent decisions of the Supreme Court, including *Garrett,* have fundamentally changed the landscape of Eleventh Amendment jurisprudence. *See, e.g.,* William A. Fletcher, *The Eleventh Amendment: Unfinished Business,* 75 Notre Dame L. Rev. 843, 843-44 (2000). *Garrett* in particular clarified, in extensive detail, the approach that a court must take when addressing a claim that the ADA validly abrogated State sovereign immunity pursuant to section 5 of the

Fourteenth Amendment.[1] *Garrett* drew on *City of Boerne v. Flores,* 521 U.S. 507 (1997), which made clear that it was up to the courts to "define the substance of [the] constitutional guarantee[ ]" that Congress purported to enforce, *Garrett,* 531 U.S. at 365 (citing *Boerne,* 521 U.S. at 519-24), and that "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" *id.* (citing *Boerne,* 521 U.S. at 520). But *Garrett* also elaborated on the *Boerne* analysis. For instance, *Garrett* made clear that once a court has "determined the metes and bounds of the constitutional right in question," it must examine "whether Congress identified a history and pattern of unconstitutional . . . discrimination *by the States* against the disabled." *Garrett,* 531 U.S. at 368 (emphasis added). A showing of discrimination against the disabled in general, or discrimination by local governments rather than the States themselves, will not do. *Id.* at 368 ("Just as § 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress' § 5 authority is appropriately exercised only in response to state transgressions."); *id.* at 368-69 (explaining that "[i]t would make no sense to consider constitutional violations on" the

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[1] To be more precise, in *Garrett* the Court explicitly addressed only the question of whether Title I of the ADA, 42 U.S.C. § 12111 *et seq.,* which prohibits discrimination against the disabled with regard to employment, validly abrogated the States' sovereign immunity. It did not address whether Title II, 42 U.S.C. § 12131 *et seq.,* which prohibits discrimination against the disabled by public entities, did so. *Garrett,* 531 U.S. at 360 n.1. As I will explain in due course, however, it is the approach set forth in *Garrett,* rather than any specific teachings about Title I or Title II, which is crucial for purposes of my analysis.

part of local governments "when only the States are the beneficiaries of the Eleventh Amendment").

Moreover, *Garrett* makes clear that generalizations about disability discrimination and how the ADA is designed to remedy it are inadequate; instead, a court must "dissect[ ] the statutory regime in question and carefully compare[ ] it to the baseline definition of constitutional action under the Fourteenth Amendment." *Reickenbacker v. Foster,* 274 F.3d 974, 981 (5th Cir. 2001). Indeed, "*Garrett* specifically focused on the burdens of proof, exceptions, and defenses available in Title I of the ADA in order to find that 'the rights and remedies created by the ADA against the States raise the same sort of concerns as to congruence and proportionality as were found in [*Boerne*].'" *Id.*

B

Garrett, then, refined the abrogation inquiry set out in *Boerne.* Regrettably, however, both cases on which *Hason* relies – *Clark* and *Dare* – were handed down before *Garrett* was decided. Accordingly, they do not undertake the searching inquiry that *Garrett* requires.

1

In *Clark,* we concluded that the ADA, as a whole, validly abrogated the States' sovereign immunity.[2] We first

[2] The claims at issue in *Clark* were brought under Title II, but we treated the ADA as a whole. This casts further doubt on the continued validity of the opinion because in *Garrett,* the Court expressly refused

(Continued on following page)

recognized, correctly, that in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Supreme Court "held that the disabled are protected against discrimination by the Equal Protection Clause." *Clark,* 123 F.3d at 1270. But from there the analysis went astray, at least as seen in hindsight through the lens of *Garrett.* Reading the ADA at its most general level, we next observed that the purpose of the ADA was "to prohibit discrimination against the disabled," *id.,* and that "Congress explicitly found that persons with disabilities have suffered discrimination," *id.* Consequently, we decided that the ADA was "within the scope of appropriate legislation under the Equal Protection Clause as defined by the Supreme Court," *id.,* and added as a general afterthought that the Act does not "provide[ ] remedies so sweeping that they exceed the harms that they are designed to redress." *Id.* We therefore concluded that the ADA was "validly enacted under the Fourteenth Amendment." *Id.*

This minimalist analysis is a far cry from the detailed approach mandated by *Garrett;* its infirmities are manifest. It is devoid of *any discussion whatsoever* of legislative findings of discrimination *by States* – and specifically, by *States* rather than by *local governments.* Nor does it analyze any of the specific provisions of Title II to arrive at its sweeping conclusion that Title II does not provide remedies so sweeping that they exceed the harms that they are designed to redress – let alone does it "lay them next to the baseline of what defines constitutional state action under the Fourteenth Amendment," *Reickenbacker,*

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to conflate the separate, detailed inquiries required for each of Title I and Title II. *See Garrett,* 531 U.S. at 360 n.1.

274 F.3d at 981, or "dissect[ ] the statutory regime in question and carefully compare[ ] it to the baseline definition of constitutional action under the Fourteenth Amendment," *id.*, as *Garrett* requires.[3]

2

In *Dare,* we attempted to square *Clark's* result with the Supreme Court's intervening decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 527 U.S. 627 (1999). But *Dare's* approach is no more sound than *Clark's.* Like *Clark's, Dare's* congruence analysis deals with legislative findings only of discrimination generally – not of discrimination *by States. See Dare,* 191 F.3d at 1174 ("When it enacted the ADA, Congress made specific factual findings of arbitrary and invidious discrimination against the disabled. On the basis of these findings, Congress concluded that the ADA was a necessary legislative response to a long history of arbitrary and irrational discrimination against people with disabilities.") (citation omitted). *Dare's* proportionality

[3] For a recent example of how a court might perform this detailed analysis in light of *Garrett,* parsing the legislative history of Title II and measuring its provisions against identified instances of discrimination against the disabled by States, *see Panzardi-Santiago v. University of Puerto Rico,* ___ F. Supp. 2d ___, No. Civ. 95-2316, 2002 WL 638533 (D.P.R. Mar. 19, 2002) (Delgado-Colon, Magistrate J.). This careful analysis led Magistrate Judge Delgado-Colon to conclude that "[t]he legislative history of the statute, particularly as to Title II, suffers from the same deficiencies identified by the Supreme Court in *Kimel* [*v. Florida Board of Regents,* 528 U.S. 62 (2000)] and *Garrett.*" *Id.* at *10; *see also id.* at *11 (concluding that "Congress exceeded its authority in abrogating the States' Eleventh Amendment immunity in suits brought pursuant to Title II of the ADA").

analysis is even less tenable, if one can call it an analysis at all:

> Having established the ADA's congruence with Congress's power to enforce the Equal Protection Clause, we turn to proportionality. In so doing, we reiterate the importance of deference to Congress in this analysis. The Supreme Court has specifically found protections for people with disabilities to be an area in which Congressional judgment should be given great deference. *See* [*Cleburne,* 473 U.S. at 442-43]. The ADA is thus an appropriate exercise of § 5 powers if Congress enacted it in response to a widespread problem of unconstitutional discrimination that includes state programs and services and if the ADA's provisions are proportional to the scope of that discrimination.
>
> As noted above, Congress made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face. *See* 42 U.S.C. § 12101(a). The ADA's particular provisions for each sector then indicate specifically the discrimination which is forbidden and the conduct needed to remedy the discrimination. *See* 42 U.S.C. § 12101 *et seq.* Although Title II's provisions may prohibit some State conduct which would pass muster under rational basis review, the Title's focus is on eliminating the discrimination outlined in the factual findings.

Id. at 1175 (footnotes omitted). Again, this sort of blanket generalization, coupled this time with a generous helping of deference to Congress, stands in stark contrast to the provision-by-provision comparison with the constitutional baseline that *Garrett* requires.

II.

In light of *Garrett,* then, it is clear that our pre-*Garrett* Title II precedents are outdated. Yet *Hason* refuses to acknowledge this. The discussion in the opinion dealing with abrogation is short; indeed, it comprises all of two paragraphs. *See Hason,* 279 F.3d at 1170-71. It can be summarized as follows: (1) *Clark* and *Dare* held Title II validly abrogated sovereign immunity; (2) *Garrett* did not expressly deal with Title II; it dealt only with Title I, and reserved judgment on Title II; *ergo* (3) *Clark* and *Dare* are good law.

This logic breaks down between steps (2) and (3). To be sure, in *Garrett* the Court expressly declined to decide whether Congress validly abrogated state sovereign immunity in enacting Title II of the ADA. *See Garrett,* 531 U.S. at 360 n.1. But it does *not* follow that because *Garrett* did not invalidate Title II, our prior case law upholding it remains relevant. For it is not just the *holding* of *Garrett* that matters; we must also be mindful of the *approach* the Court set forth there. As the foregoing analysis makes clear, the blunt approach taken in *Clark* and *Dare* has now been supplanted with a new, more nuanced inquiry. If we are to follow *Garrett* faithfully, we must re-analyze our prior precedents accordingly.

Two of our sister circuits have already recognized as much, and have re-analyzed *their* pre-*Garrett* precedents holding that Title II validly abrogated States' sovereign immunity. Each has concluded that Title II did not abrogate sovereign immunity – old circuit precedents to the contrary notwithstanding. *See Reickenbacker,* 274 F.3d at 981 (concluding that *Garrett* "effectively overruled" prior circuit precedent holding that Title II validly abrogated

State sovereign immunity); *Thompson v. Colorado,* 278 F.3d 1020, 1034 (10th Cir. 2001), *cert. denied,* ___ S. Ct. ___, 2002 WL 83622 (U.S. May 20, 2002).

Indeed, *Hason's* holding, that Title II validly abrogated States' sovereign immunity, period, splits us from seven of our peers that have considered the issue in the post-*Garrett* world. *Every one,* besides us, has gotten the message that something more nuanced is required; we now stand alone. *See Klingler v. Dir., Dep't of Revenue,* 281 F.3d 776, 777 (8th Cir. 2002) (affirming pre-*Garrett* decision holding that Title II did not validly abrogate State sovereign immunity); *Reickenbacker,* 274 F.3d at 983; *Thompson,* 278 F.3d at 1034; *Erickson v. Bd. of Governors of State Colls. and Univs.,* 207 F.3d 945, 948 (7th Cir. 2000) (questioning the continued authority of *Crawford v. Indiana Department of Corrections,* 115 F.3d 481, 487 (7th Cir. 1997), which upheld Title II as a valid abrogation of State sovereign immunity), *cert. denied,* 531 U.S. 1190 (2001); *see also Popovich v. Cuyahoga County Court of Common Pleas,* 276 F.3d 808, 812, 815-16 (6th Cir. 2002) (en banc) (agreeing that Title II is not a valid abrogation of sovereign immunity when Congress is enforcing the Equal Protection Clause, but holding that it is permissible when enforcing the Due Process Clause); *Garcia v. S.U.N.Y. Health Scis. Center,* 280 F.3d 98, 110-12 (2d Cir. 2001) (holding that Title II actions may only be brought against States if the plaintiff can establish that the "violation was motivated by discriminatory animus or ill will based on the plaintiff's disability"); *cf. Brown v. N.C. Div. of Motor Vehicles,* 166 F.3d 698, 707 (4th Cir. 1999) (holding that a regulation enacted pursuant to Title II did not validly abrogate State sovereign immunity).

III

Clark and *Dare* have gone the way of the dodo bird and the wooly mammoth, overtaken and relegated to extinction by the course of events. "*Clark* is now outdated – and *Douglas* wrong – for failing to recognize the change in the legal landscape of sovereign immunity." *Douglas,* 285 F.3d at 1226-27 (O'Scannlain, J., dissenting from denial of rehearing en banc). As every circuit to have analyzed the issue now agrees (except, of course, ours), in light of *Garrett,* Title II did not abrogate the Eleventh Amendment immunity of the several States.

We should have taken *Hason* en banc to reconsider, and to overrule, *Clark* and *Dare*. I respectfully dissent.

APPENDIX F

Michael J. Hason, M.D.
Plaintiff in pro per
1710 NW 87 Ave.
Plantation, FL 3322 [sic]
(954) 424-4082

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Michael J. Hason, M.D.,

Plaintiff, in pro per,

v.

The Medical Board of the State of California; Dept. of Consumer Affairs of the State of California; Arlene Adams, the Director of the Dept. of Consumer Affairs of the State of California; Neil Fippin, Individually and as the Manager, Licensing Program of the Medical Board of the State of California; Melinda Acosta, Individually and as an official of the Medical Board of the State of California; Ron Joseph, Individually and as Executive Director of the Medical Board of the State of California and as Director of the Dept. of Consumer Affairs of the State of California; Bruce Hasenkamp, Individually and as President of the Division of

COMPLAINT
and Jury Demand

Licensing of the Medical Board of the State of California; Dr. Ira Lubell, Individually and as Pres. of the Division of Medical Quality of the Medical Board of the State of California; Dr. Carole H. Hurvitz, Dr. Anabel A. Imbert, Dr. Raquel D. Arias, Dr. Klea D. Bertakis, Dr. Jack Bruner, Daniel Livingston, Karen McElliott, Dr. Alan E Schumacher and Kip S. Skidmore, Individually and as Members of the Medical Board of the State of California's Division of Medical Quality; Dr. Thomas A. Joas, Karen McElliott and Bernard Alpert, Individually and as Officers of the Medical Board of the State of California and its Div. of Licensing Michael I. Sidley and Dr. Raja Toke, Individually and as Executives of the Medical Board of the State of California's Division of Licensing; the State of California; and Senior Investigator, Medical Board of California,

Defendants

Background

1. The Plaintiff, Dr. Michael J. Hason, applied for a license to practice medicine in the State of California in the Spring of 1995. In August of 1996, the Medical Board of the State of California (MBSC) denied Dr. Hason's application, citing mental illness and an act that would require the suspension or revocation of a licensed

physician's license to practice medicine in the State of California. After appeal, the service of a Statement of Issues and a hearing the MBSC affirmed its decision in 1998. It's Order was stayed for approximately one month for consideration of Plaintiff's Petition for Reconsideration, which was denied. The Order took effect on about April 24, 1998.

2. This Court has jurisdiction over the within case due to diversity of citizenship and because the suit is based upon federal statutes, including but not limited to the Civil Rights Statutes 42 U.S.C. 1980-88, the Americans with Disabilities Act, the Rehabilitation Act, if applicable, the Constitution of the United States of America, including but not limited to the due process clause and the equal protection clauses of the 14th Amendment, the privileges and immunities clauses and the 13th Amendment, if applicable, and the statutes and Constitution of the State of California, as applicable.

As and for a First Cause of Action

3. The Defendants proceeded under statutes which were violative of the Constitution of the United States and that of the State of California, including, but not limited to their use and application of a vague and overbroad State statute that targeted applicants and physician licensees who were described in the licensing statute as mentally ill, where this group also included physicians who had a history of mental illness and who were not actively mentally ill, or who were actively mentally ill, but able to practice medicine safely anyway.

4. All or many of these individuals and/or Dr. Hason were targeted for increased scrutiny and investigation

which promoted the exclusion of these physicians from the practice of medicine in the State of California, regardless of their ability to practice medicine safely or the fact that they were otherwise qualified.

5. The statutes on their face and as applied are unconstitutional, should be declared void and all decisions had under them should be declared void and of no effect, including and particularly, decisions regarding the license application of Dr. Hason, such as decisions made by Defendants August 1996 and April 1998 denying Dr. Hason's application for a medical license.

6. The statutes referred to include, but are not limited to the statute that states that a license to practice medicine may be denied for the reason of mental illness.

As and for a Second Cause of Action

7. The Plaintiff repeats the allegations numbered 1-3, as if more fully set forth here. The Defendants violated the Plaintiff's rights under the Americans with Disabilities Act by illegally and invasively requesting that he provide to them all medical records concerning his history of treatment for depression which extended back to the year 1970.

8. The Defendants further violated Plaintiff's rights under the ADA by not properly applying the "direct threat" standard enunciated by the EEOC and Justice Dept. as the proper standard to find that a license applicant is a danger to his prospective patients or others. The Defendants did this throughout the application proceedings, including, but not limited to, their initial decision in Aug. 1996, their behavior after getting input from Dr.

David Glaser, their behavior after getting input from Florida from Dr. Robert Perovich and Mr. David Molko, M.S.W., and did so by adopting the administrative Judge's decision which did not properly apply this standard. The Defendants did not properly apply the standard in considering the Plaintiff's Petition for Reconsideration as that Petition established Plaintiff's readiness to practice medicine safely and identified many irregularities in the proceedings had against Dr. Hason by the MBSC and its agents.

9. The Defendants violated the ADA by not accommodating Plaintiff by offering him a probationary medical license, conditioned on his agreement and actual cooperation with some supervising physician and/or psychiatrist and/or psychotherapist for psychotherapy, guidance and/or other supervision, as needed, reasonable and legal.

As for a Third Cause of Action

10. The Plaintiff repeats allegations numbered 1-9, as if more fully set forth here. Apparently, after receipt of Plaintiff's medical record from 1992 hospitalization in Philadelphia, an executive of the Medical Board recklessly determined and stated in writing that the Plaintiff was a "narcissistic jerk," and stated that the Medical Board of the State of California (MBSC) should seek a psychiatric evaluation of Plaintiff in order to block his application's viability, thus biasing all further proceedings and destroying their objectivity. On information and belief, this document was also published to Dr. Michael Meek, prejudicing that consultant's initial mindset and biasing his ultimate opinions later expressed in his report to the

MBSC about the summer of 1996 and in his testimony during Sept. and Oct. 1997.

As for a Fourth Cause of Action

11. The Plaintiff repeats allegations numbered 1-5, as if more fully set forth here. Plaintiff was directed to pay MBSC $2000.00 as a charge for the evaluation by their psychiatric consultant, Dr. Michael Meek (Meek), which fee was calculated to illegally exclude the Plaintiff from the practice of medicine in California.

As for a Fifth Cause of Action

12. The MBSC and Defendants intentionally and/or recklessly hired an unqualified and biased psychiatrist to evaluate the Plaintiff.

13. Further, the MBSC specifically encouraged the bias of the psychiatrist Meek, conspiring with him, by showing him the written statement of the MBSC official who had stated that the Plaintiff was a "narcissistic jerk." Further, they controlled and biased the psychiatrist's perceptions and conclusions by paying him only in cases where he filed a negative report. Thus, they made it perfectly clear to Meek that they sought negative reports on physicians referred to him for evaluation and/or on Dr. Hason and not fair and objective evaluations. These actions and the conspiracy among the Defendants impaired Plaintiff's rights to a fair psychiatric evaluation and prejudiced beyond repair the objective consideration of Plaintiff's application for a medical license.

As for a Sixth Cause of Action

14. The Plaintiff repeats allegations 1-13, as if more fully set forth here. Despite the unqualified Psychiatrist's finding that the Plaintiff's mental status was essentially normal, and despite the Plaintiff's score of normal on the highly respected MMPI psychological test, the MBSC and other Defendants accepted the Psychiatrist's trumped up conclusions and false recitation of facts regarding Plaintiff. These facts included, but were not limited to 1) the psychiatrist Meek's claim that the Plaintiff abandoned his patients when he was a resident at the State University of New York at Stony Brook during 1993-94 and 2) was absent without leave for an extended period of time from his residency post at Stony Brook in about May of 1994 and just inexplicably turned up at a hotel in New Orleans, were patently false, calculated to obstruct justice and could have easily been checked out by Meek or the MBSC, or the Defendants. They intentionally and recklessly did not do so, even after Plaintiff's refutation, pleadings, explanations and denials under oath in Sept. 1997. The Defendants recklessly continued to use these bogus facts in an attempt to paint the Plaintiff as a dangerous physician and confuse and mislead the Administrative Judge assigned to Plaintiff's case.

15. The Defendants also accepted their psychiatrist Meek's bogus diagnosis for Plaintiff of narcissistic personality disorder on the basis of totally inadequate evidence and were reckless in their use of this bogus diagnosis to trump up a case against Plaintiff.

16. Similarly, they adopted and promoted a bogus diagnosis of multiple drug dependency authored by Dr. Meek,

despite clear evidence of the incorrectness of this diagnosis.

17. The Defendants also acted improperly by adopting the results of the inappropriately administered personality test named for its creator Dr. Millon and countenanced the exaggerated used [sic] of this unreliable data, by adopting Meek's stretch of narcissistic trait score on the test into a diagnosis of a full blown personality disorder.

18. The Defendants also countenanced Meek's numerous exaggerations, fabrications, wild illogical conclusions and accusations, including, but not limited to, those presented as evidence of "bias" in the Closing Statement of Plaintiff's attorney, Ms. Kollar, incorporated here as if more fully set forth, and those presented by Plaintiff in his Petition for Reconsideration, incorporated here, as if more fully set forth.

As for a Sixth [sic] Cause of Action

19. The Plaintiff repeats allegations numbered 1-18, as if more fully set forth here. After receiving Plaintiff's notice of appeal MBSC and Defendants drew up a Statement of Issues that included a bogus charge relating to the claim that the Plaintiff was mentally ill.

20. They did not serve it upon the Plaintiff until months after the proper time for service.

21. Further, they included a second charge based on Plaintiff's failure to include his attendance at a residency at the Graduate Hospital in Aug.-Oct. 1992. They did this, after Plaintiff fully cooperated with them, giving them information about his attendance at the Hospital, which included positive statements by one Elliot Nierman,

Program Director, which showed that Plaintiff had not failed to present information that was material to the question of whether he was entitled to a license to practice medicine in California.

22. Further, they rejected positive evaluations and certifications that Dr. Hason was safe, from two Board Certified psychiatrists, Dr. David Glaser and later Dr. Robert Perovich, both of whom, had enjoyed an extended opportunity to evaluate Dr. Hason for his ability to practice medicine safely.

As for a Seventh Cause of Action

23. The Defendants also delayed the scheduling of the administrative hearing on appeal well beyond the 90 day limit of the relevant statute, did not apply to the Administrative Hearings Division or Judge for statutorily permitted extensions of time for good reasons shown and scheduled the hearing beyond the date permitted even by the maximum number of permitted extensions.

As for a [sic] Eighth Cause of Action

24. At Plaintiff's hearing on the appeal in the Fall of 1997, Defendants made many false and misleading assertions against the Plaintiff, in bad faith, regarding facts that were false and that could easily have been verified and found to be false and which also included many trumped up exaggerations obstructing justice. Thus, they provided the Administrative Law Judge with a confused and spurious database and a difficult decision concerning the safety of granting a license to Dr. Hason.

25. To repeat, they failed to properly investigate the facts that they relied upon and took no proper action to re-evaluate their data, once they were pointedly alerted to the falsity of their data by Dr. Hason's sworn testimony at the hearing, by the questions of Ms. Kollar, Dr. Hason's attorney and by other more obvious inconsistencies and patent absurdities, promoted for them by Meek.

26. They intentionally and recklessly ignored the facts that Dr. Hason had worked as a physician caring for approximately 500 patients, without suffering any substantiated charge of negligence, or suffering any accusation of depression, narcissism or hypomania by his supervising physicians at St. Vincent's Hospital, Bridgeport, CT, 1991-92, SUNY at Stony Brook, 1993-94 or at the VA Medical Center, W. Los Angeles, 1994-95. They further ignored the fact that on the occasions when Dr. Hason did work as a physician, while actually depressed, no supervisor accused him of any act of negligence.

27. By not weighing these facts, the Defendants did not obey the dictates of the ADA which required that they find and prove that Dr. Hason posed a "direct threat" to the health and safety of his prospective patients or others. If the Defendants still were justifiably concerned, they failed to accommodate Plaintiff as required by the ADA

As for and [sic] Ninth Cause of Action

28. The Plaintiff repeats allegations numbered 1-27, as if set forth here more fully. The Defendants, further, abused their discretion by failing to properly evaluate, investigate and articulate a written or reasonable decision, with regard to the information advanced by Dr. Hason in his Petition for Reconsideration, including but not limited to

the information that Dr. Hason had not abandoned any patients while at Stony brook, was well and ready to practice medicine in California safely and that he was agreeable to and felt that an accommodation, such as a probationary license, was appropriate.

29. MBSC and Defendants refused to seriously consider psychiatric updates from Dr. Perovich, a board certified psychiatrist and David Molko, M.S.W., both of whom had treated and observed Dr. Hason for more than six months by the time that the Petition was being reviewed by MBSC and Defendants. Further, the statements by these health professionals made it clear that Dr. Hason was following the health maintenance suggestions of the Defendants and was stable and highly likely to remain in treatment, as long as necessary (and continue to benefit from the therapy) all in accord with what the Defendants had indicated was good and necessary for the safe practice of medicine by Dr. Hason.

30. Those two professionals, Dr. Perovich and Mr. Mc'ko, were continuing to treat Dr. Hason again in line with the Defendants expressed suggestions and original reservations to licensing. The mental health experts, both filed very positive reports, certifying again Dr. Hason's safety to practice medicine based on an even longer period of examination. They also made statements evidencing their serious reservations about the conclusions of the MBSC's psychiatrist Dr. Meek, which apparently the Defendants did not consider appropriately and which did not prompt any further serious consideration of the situation fostered by the acts of Defendants. Once again, the two health professionals recertified to the Defendants that Dr. Hason was stable and safe to practice medicine. All of this was ignored intentionally, because of the MBSC's bias and

invidious discriminatory inclinations regarding Dr. Hason, whom they accused of mental illness and being unsafe to practice medicine in the State of California to cover their invidious subjective discriminatory biases against him for having had a history of depression and other factors like his leaving out the Graduate Hospital from his application and their receipt of certain phony accusations by Dr. Davis of SUNY at Stony Brook and because of the false and deceptive acts and behavior of Meek, i.e., they used this accusation of mental illness as a trumped up mechanism to block Dr. Hason's application when, in reality, they chose to deny the license on illegal and hidden bases, denying Dr. Hason the equal protection of the laws.

As and for a Ninth Cause of Action

31. The Plaintiff repeats the allegations numbered 1-30, as if more fully set forth here. The Defendants violated Plaintiff's right to a fair and speedy hearing under the relevant statutory 90 day period within which they must hold a [sic] such a hearing to decide Plaintiff's appeal. This period began to run after Plaintiff's appeal from Defendants' initial decision of August, 1996 denying Plaintiff's application for a medical license.

As and for a Tenth Cause of Action

32. The Plaintiff repeats the allegations numbered 1-33, as if more fully set forth here. The Defendants informed Dr. Hason that his license had been denied for two reasons, mental illness and his doing of an act that would cause the MBSC to suspend or revoke the license of a physician already licensed in California. They failed to explain to the Plaintiff how he was mentally ill. They

failed to tell Dr. Hason what act he had done that they were relying upon. They thus severely intruded on Dr. Hason's due process rights and ability to decide upon whether to appeal and how he could defend himself.

As for an Eleventh Cause of Action

33. The Plaintiff repeats allegations numbered 1-32, as if more fully set forth here. The bare bones denial of license served in August, 1996 was also calculated to intentionally inflict emotional distress, was outrageous and did cause Plaintiff to suffer severe emotional and ultimately consequential emotion or stress induced and other physical injury.

As for a Twelfth Cause of Action

34. The Plaintiff repeats allegations numbered 1-33, as if more fully set forth here. The Defendants proceeded on a Statement of Issues that included charges relating to mental illness that were bogus and unworthy of serious legal consideration. The Defendants failed to state an actionable cause for license denial in the acceptable domain of mental illness reasons for denial. They trumped up some tale about how Plaintiff had a narcissistic personality disorder, had been depressed in the past and would not seek treatment if he got depressed, because the narcissistic personality disorder would prevent him from understanding that he needed treatment to hide illegal or no proper bases to deny Dr. Hason a license.

35. They also relied on a second charge based on the failure of the Plaintiff to include some data about the Graduate Hospital, that was essentially collateral to the necessary determination of Plaintiff's fitness to practice

medicine safely in California, after Plaintiff had cooperated fully with them in the production of information relating to his training at the Graduate Hospital.

As for a Thirteenth Cause of Action

36. The Plaintiff repeats the allegations numbered 1-35, as if more fully set forth here. The Defendants acted in violations of 42 U.S. Code 1981-88, et seq., by acting under the color of state law and doing the many acts referred to in this Complaint which were intended to deprive the Plaintiff of his rights protected under the Constitution and the Statutes of the United States of America as well as the Constitution and Statutes of the State of California. The actions of the Defendants violated the Plaintiff's liberty rights by preventing him from choosing and working in the profession of his choice, obtaining the proper license and living and working in the State of his choice after recent entry into the State of California.

37. They also violated his due process rights by making an adversarial game and using lies and distortions instead of a fair and proper evaluation of Plaintiff's skills, abilities, mental condition and shortcomings.

38. They violated his equal protection rights by treating Plaintiff unlike others similarly situated with a history of mental illness and no recent active illness and/or those with mental illness who were still safe to practice medicine, by doing all of the acts mentioned herein calculated to make anyone with a history of mental illness and/or Dr. Hason particularly, or with mental illness but safe to practice medicine, despite the illness, look as if they were unsafe and that no reasonable accommodation or agreement or adjustment could make them safe.

As for a Thirteenth Cause of Action

39. The Plaintiff repeats each allegations [sic] numbered 1-38, as if more fully set forth here. The Defendants violated Plaintiff's rights under the Privileges and Immunities Clause of of [sic] the United States Constitution that protects the right of citizens to travel between States and to live in any State with the same rights as its other citizens including, but not limited to, living and working in one's chosen profession, obtaining necessary licenses from the government, having a family and supporting it through paid work as a physician, licensed or otherwise and thus the Defendants also violated Dr. Hason's rights and/or violated similar rights of others similarly situated with Dr. Hason with regards to his recent entry into the State and/or that factor in combination of Dr. Hason's memberships in the class of those with a history of mental illness. They violated the Privileges and Immunities Clause of the United States Constitution by treating Plaintiff differently than other residents of the State of California, by preventing him from working in the State of California as a physician, the profession which he had chosen and in which he was qualified legally, and by harming him in further ways as elaborated in this Complaint and by constructively or literally driving him out of the State of California. They did this for the reasons already mentioned concerning their biases about mental illness and their hidden agenda other than a valid belief in Dr. Hason's actual mental illness or proper evidence thereof and painted Dr. Hason as mentally ill and unsafe because Plaintiff was an "outsider," an individual recently arrived from New York State and a person whom they wished to drive from their State and following the lead of Meek, from medicine entirely.

As and for a Fourteenth Cause of Action

40. The Plaintiff repeats each allegation numbered 1-39, as if more fully set forth here. The Defendants violated Plaintiff's rights by violating his rights under the 13th Amendment of the constitution of the United States of America by attempting to create a class of slaves including the mentally ill who were able to function safely in professional positions and those with a history of mental illness. The Plaintiff was a member of this class. This class of slaves, including Dr. Hason, was deemed unable to work as a freeman [sic] who could chose their profession and seek business among the populace. Dr. Hason was treated as someone who would not be allowed to provide for himself, not be allowed to have a family which he could support and would be told how he was to care for his own health and was told not to contribute to decisions that others would make about how he should care for his health, which were a further violation of Plaintiff's liberty.

As and for a Fifteenth Cause of Action

41. The Plaintiff repeats each allegation numbered 1 through 40, as if more fully set forth here. The Defendants violated Plaintiff's rights under the State of California's Constitution and statutes, including but not limited to those clauses protecting the Plaintiff's right to pursue and obtain happiness, work, reputation, possessions with free enjoyment thereof, and to do so under conditions of liberty, due process and the equal protection of the laws. They also violated California's statutory declaration of the right to equal protection in employment for all individuals "otherwise qualified."

As and for an [sic] Sixteenth Cause of Action

42. The Plaintiff repeats each allegation numbered 1 through 41, as if more fully set forth here. The Defendants violated the Plaintiff's rights by invading his privacy as prohibited by the due process clause of the Constitution of the United States, 14th Amendment, substantively, by acts including, but not limited to, requesting all of Plaintiff's medical records relating to psychotherapeutic treatment and treatment for depression, by directing him to appear for an examination by a psychiatrist, by choosing a biased and unqualified psychiatrist, by encouraging that psychiatrist to falsify the facts and his conclusions about Dr. Hason, thus further forcing Dr. Hason to produce documents and testify on his own behalf concerning private matters and to testify under cross-examination about private matters and to generate arguments, statements and documents revealing private matters, all necessary to try and overturn, oppose and influence the decisions of the Defendants. The Defendants acted in this manner, despite constant warnings to Defendants of the illegality of their acts.

As for a Seventeenth Cause of Action

43. The Plaintiff repeats allegations numbered 1-42, as if more fully set forth here. The Defendants conspired among themselves, while considering and doing the acts complained of in this Complaint, thus further violating the Plaintiff's rights under the federal and State laws already mentioned, including, but not limited to, 42 U.S.C. 1985 and the ADA.

Damages

44. With respect to each cause of action, the Defendants have severely injured Dr. Hason's reputation, irreparably and permanently, and damaged Dr. Hason emotionally, physically, and financially. Further, the consequences of the Defendants' acts mentioned herein have been to seriously impair Plaintiff's ability to proceed in an unimpaired fashion with his life and medical career. The Defendants, further, acted intentionally, recklessly and/or in violation of established law and therefore are liable to the Plaintiff for punitive damages in addition to compensatory damages, including all consequential and/or foreseeable damages.

45. The facts described in the entire Complaint are all alleged by the Plaintiff to be actionable under each and every theory stated in the Complaint.

WHEREFORE, the Plaintiff, Michael J. Hason, Requests that this Court decide and adjudge before or after a jury trial that the Defendants are liable for damages to the Plaintiff in the amount of $20,000,000 on each cause of action and an additional $20,000,000 for punitive damages on each cause of action, plus attorneys fees, expenses and costs, and requests that this Court direct the MBSC to issue to Dr. Hason a license to practice medicine in California, and find that the statute permitting the Medical Board of the State of California to find individuals, or Dr. Hason, unfit to practice medicine due to mental illness to be unconstitutional, void for reasons of its vagueness, overbreadth, violative of the Americans with Disabilities Act, violation of other federal civil rights statutes and the 14th Amendment of the Constitution of the United States, or to hold similarly as applied in the

case of Dr. Hason's application for a medical license, and grant other and further relief to the Plaintiff that is fair and just in the premises.

Dated: April 16, 1999

/s/ Michael J. Hason
Michael J. Hason, M.D.
Plaintiff, in pro per

ORIGINAL

Supreme Court, U.S.
FILED
OCT 17 2002
CLERK

No. 02-479

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2002

MEDICAL BOARD OF CALIFORNIA,
Petitioner

v.

MICHAEL J. HASON,
Respondent

MOTION OF MICHAEL J. HASON, RESPONDENT, TO PROCEED *IN FORMA PAUPERIS*

The respondent, Michael J. Hason, asks leave to proceed *in forma pauperis* and to file the attached Brief in Opposition to Petition for Writ of Certiorari. Dr. Hason filed this lawsuit *pro se* in the United States District Court for the Central District of California. After the suit was dismissed by the District Court, he filed a *pro se* appeal to the United States Court of Appeals for the Ninth Circuit. Dr. Hason was granted *in forma pauperis* status in both the District Court and in the Court of Appeals.

The Ninth Circuit pursuant to 28 U.S.C. §1915(e)(1), appointed Erwin Chemerinsky to represent Dr. Hason in briefing and arguing the case. Erwin Chemerinsky, a member of the Bar of this Court, has agreed to continue to

represent Dr. Hason, without charge, through the remainder of the proceedings concerning this matter. No affidavit is attached because the United States Court of Appeals appointed counsel in this matter.

Respectfully submitted,

Erwin Chemerinsky

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Certificate of Service

I, Erwin Chemerinsky, a member of the Bar of this Court, hereby certify that on the 16th day of October 2002, three copies of the **MOTION OF MICHAEL J. HASON TO PROCEED *IN FORMA PAUPERIS*** were mailed, first class postage prepaid, to:

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No. 02-479

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2002

MEDICAL BOARD OF CALIFORNIA,
Petitioner

v.

MICHAEL J. HASON,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment bars suit against the California Medical Licensing Board pursuant to Title II of the Americans with Disabilities Act for discrimination based on disability.

2. Whether the California Medical Licensing Board's discrimination based on disability in granting a medical license violates Title II of the Americans with Disabilities Act which prohibits the government from discriminating against the disabled in its "services, programs or activities."

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Michael J. Hason hereby opposes the Petition for a Writ of Certiorari by the Medical Board of California to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Respondent adopts and incorporates by reference all opinions and orders below that are set forth in Appendices A through F to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Dr. Michael J. Hason, applied for a license to practice medicine in California in March 1995. After three years of consideration, in April 1998, the California Medical Board denied Dr. Hason's application for a medical license based on his prior history of depression. Dr. Hason filed a *pro se* complaint in federal district court on April 21, 1999, alleging that he was impermissibly discriminated against based on his disability in violation of his rights under the United States Constitution and the Americans with Disabilities Act. Dr. Hason named as defendants the Medical Licensing Board of California and several officials and officers of the Medical Licensing Board. Dr. Hason sought both damages and injunctive relief.

On February 1, 2000, the United States Magistrate Judge issued a Report

and Recommendation. The Magistrate Judge recommended dismissal of Dr. Hason's complaint on two grounds. First, the Magistrate Judge said that the claims against state officers and state agencies for injunctive and damages relief were barred by the Eleventh Amendment. Report and Recommendation of the Magistrate Judge, pp. 2-3 (Appendix D to the Petition for Writ of Certiorari). The Magistrate Judge ruled that state officers may not be sued for injunctive relief and said that the Eleventh Amendment bars "plaintiff's federal civil rights claims against those defendants to the extent that the plaintiff is seeking injunctive relief." *Id.* The Magistrate Judge also ruled that the State government may not be sued for violating Title II of the Americans with Disabilities Act. Second, the Magistrate Judge said that there is not a cause of action under Title II for discrimination based on disability in issuing a medical license.

On March 31, 2000, the United States District Court, without a written opinion, issued an Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge. (Appendix C to the Petition for Writ of Certiorari).

The United States Court of Appeals for the Ninth Circuit reversed the District Court and held that Title II may be used to sue the state because it is an appropriate exercise of Congress's power under section five of the Fourteenth

Amendment. The court also ruled that state officers may be sued for injunctive relief pursuant to §1983.[1] Additionally, the court held that medical licensing is a "service, program, or activity" within the scope of Title II of the Americans with Disabilities Act and thus that Dr. Hason stated a claim upon which relief could be granted. (Appendix A to the Petition for Writ of Certiorari).[2]

The State of California sought *en banc* review in the United States Court of Appeals for the Ninth Circuit. On June 26, 2002, the Ninth Circuit denied the request for *en banc* review. (Appendix E to the Petition for Writ of Certiorari).

REASONS THE PETITION SHOULD BE DENIED

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY APPLIED CLEARLY ESTABLISHED PRINCIPLES IN HOLDING THAT THE CALIFORNIA MEDICAL LICENSING BOARD COULD BE SUED FOR VIOLATING TITLE II OF THE AMERICANS WITH DISABILITIES ACT

The Petitioner, the California Medical Licensing Board, is obviously correct

---

[1]The State understandably is not seeking certiorari on the Ninth Circuit's holding that state officers may be sued for injunctive relief under *Ex parte Young* 209 U.S. 123 (1908).

[2]The Court of Appeals also ruled that the claims for damages against the officers in their individual capacities were properly dismissed for failure of service of process. Therefore, Dr. Hason's recovery of damages rests entirely on his claim against the Medical Licensing Board, pursuant to Title II of the Americans with Disabilities Act, which is the focus of the Medical Licensing Board's Petition for a Writ of Certiorari.

in identifying a split among the circuits concerning whether state governments may be sued for violating Title II of the Americans with Disabilities Act. *See, e.g., Wessell v. Glendening*, 2002 WL 31121398 (4th Cir. Sept. 26, 2002) (states may not be sued for violating Title II); *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002) (states may be sued for violations of Title II in cases in which the court "identifies a constitutional violation by the state"); *Klingler v. Director, Department of Revenue*, 281 F.3d 776 (8th Cir. 2002) (states may not be sued for violating Title II); *Garcia v. S.U.N.Y. Health Sciences*, 280 F.3d 98 (2d Cir. 2001) (states may be sued for violations of Title II only if there are allegations of discriminatory animus against the disabled); *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1961 (2002) (states may not be sued under Title II); *Popovich v. Cuyoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, 70 U.S.L.W. 3656 (October 7, 2002) (states may be sued under Title II for due process violations, but not for equal protection violations); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001) (states may not be sued).

However, review is unnecessary in this case because the Ninth Circuit correctly applied this Court's precedents in holding that the Medical Licensing Board may be sued for violating Title II of the Americans with Disabilities Act.

In its most recent decision concerning sovereign immunity, *University of Alabama v. Garrett*, this Court said that it was applying "now familiar principles." 121 S.Ct. 955, 963 (2001). Specifically, the Court said in assessing the validity of "§5 legislation reaching beyond the scope of §1's actual guarantees," the legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 963 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

In *Dare v. California,* the Ninth Circuit undertook *exactly* this analysis and unequivocally concluded that Title II of "the ADA the ADA was a congruent and proportional exercise of Congress's enforcement powers under §5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity." 191 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied*, 121 S.Ct. 1187 (2001). *Dare* was decided after the Supreme Court's rulings in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Florida Prepaid Postsecondary Expense Education Board v. College Savings Bank*, 527 U.S. 627 (1999), clarified the law with regard to Congress's power to override the Eleventh Amendment and its authority under §5 of the Fourteenth Amendment.

In this case, the United States Court of Appeals for the Ninth Circuit followed its precedents, *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir.

1997) and *Dare v. California*, and held that the State Medical Licensing Board could be sued for discrimination based on disability. The Medical Licensing Board contends that the Supreme Court's decision in *Garrett* undercuts these Ninth Circuit decisions. *Garrett* does nothing of the sort. In *Garrett*, at the outset of the majority opinion, this Court expressly stated that it was not considering the constitutionality of Title II because it "has somewhat different remedial provisions from Title I." 121 S.Ct. at 960 n.1. Moreover, in *Garrett*, this Court contrasted the lack of a documented history of discrimination in employment by the states (the focus of Title I), with the Congressional record detailing discrimination by the states in providing public services (Title II). Id. at 966 & n.7.

Title II differs from Title I in four significant respects. First, Congress made express findings of persistent discrimination in "public services." Unlike employment, where Congress made a finding about private employment, but no analogous finding for public employment, 121 S.Ct. at 966, in the text of statute itself Congress made express findings of persisting discrimination in "education, . . . institutionalization, . . . voting, and access to public services." 42 U.S.C. §12101(a)(3). The same Committee Reports that the Court in *Garrett* found lacking with regard to public employment are directly on point in finding government discrimination with regard to public services. *See* S. Rep. No. 116,

101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28 (1990).

Second, Congress's findings were based on an extensive record of unconstitutional state conduct regarding people with disabilities in the areas covered by Title II, a record more extensive than existed for employment alone. The Ninth Circuit, in *Dare*, relied on this record in concluding that Title II is a constitutional exercise of Congress's section five power because of the documented pattern of pervasive constitutional violations. 191 F.3d at 1175.

Third, unlike Title I, which was intended simply to redress violations of the Equal Protection Clause as applied to a non-suspect class in an area (employment) not otherwise subject to heightened scrutiny, the range of constitutional violations implicated by Title II extends to areas where heightened judicial scrutiny is appropriate. Title II governs all the operations of a State, which plainly encompasses state conduct subject to a number of other constitutional limitations embodied in the First, Fourth, Fifth, Sixth, Seventh, Eighth Amendments and incorporated and applied to the States through the Fourteenth Amendment. These rights include the right to vote, to access the courts, to petition officials for the redress of grievances, to be accorded due process by law enforcement officials, and to humane conditions of confinement.

Finally, the remedy enacted by Congress is more proportional and congruent to this record of violations than the record discussed in *Garrett*. Title II targets discrimination that is unreasonable. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. Title II also permits discrimination if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. 12131(2). But once an individual proves that she can meet all but the non-essential eligibility requirements of a program or service, the government's interest in excluding that individual "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally problematic. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. Title II thus carefully balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice v. Cayetano*, 120 S. Ct. 1044, 1057 (2000). It is exactly for this reason that the Ninth Circuit found that Title II is a constitutional exercise of Congress's powers under section five of the Fourteenth Amendment.

II. BECAUSE THERE IS NO SPLIT AMONG THE CIRCUITS AND BECAUSE THE NINTH CIRCUIT CORRECTLY FOLLOWED CLEARLY ESTABLISHED LAW, THIS COURT SHOULD NOT GRANT REVIEW AS TO WHETHER DENYING A MEDICAL LICENSE BASED ON DISABILITY IS ACTIONABLE UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Title II of the Americans with Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132(2). Dr. Hason's complaint alleges that he was denied a medical license because of a mental disability, specifically his prior bouts of depression. Dr. Hason's complaint alleges that his depression has been successfully treated and that he is thus able to perform as a doctor.

The United States Court of Appeals for the Ninth Circuit ruled that there is a cause of action under Title II of the Americans with Disabilities Act for discrimination against the disabled in medical licensing. In reaching this conclusion, the court applied the literal language of Title II, its broad remedial purposes, and well established law to conclude that discrimination based on disability in medical licensing is prohibited by Title II of the Americans with Disabilities Act.

This holding does not conflict in any way with the decisions of any other Circuit. No other Circuit has yet ruled on the issue. The Medical Licensing Board, in its Petition for a Writ of Certiorari, identifies only one district court decision which is contrary to the Ninth Circuit's holding. *Alexander v. Margolis*, 921 F.Supp. 482 (W.D. Mich. 1995), *aff'd on other grounds*, 98 F.3d 1341 (6th Cir. 1996). In light of the absence of any split in the circuits, this is not an issue which the Supreme Court should address at this time.

Title II prohibits the government from discriminating in "services, programs, or activities." Issuing medical licenses obviously fits within this description. The Court of Appeals properly concluded that "the magistrate judge's narrow construction of the phrase 'services, programs, or activities,' is at odds with the remedial goals underlying the ADA. Courts must broadly construe the language of the ADA broadly in order to effectively implement the ADA's fundamental purpose of 'providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Hason v. Medical Board of California*, 279 F.3d 1167, 1172 (9th Cir. 2002) (citations omitted).

Nothing in Title II or its legislative history provides any basis for excluding medical licensing from its scope. The Court of Appeals followed its prior

decision in *Zimmerman v. Oregon Department of Justice*, 170 F.3d 1169 (9th Cir. 1999), and concluded that Title II applies because licensing is an "output," a "service" provided by the State. The court explained: "Viewed in light of the *Zimmerman* framework, medical licensing is an output of a public agency, not an input such as employment. The act of licensing involves the Medical Board (i.e. a 'public agency') providing a license (i.e. providing a 'service') to an applicant for a medical license." 279 F.3d at 1172.

Because there is no split among the circuits on this issue and because of the strong basis for the Court of Appeal's decision in the text and history of the Americans with Disabilities Act, certiorari should not be granted on this issue.

Conclusion

For the foregoing reasons, respondent Michael J. Hason urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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Certificate of Service

I, Erwin Chemerinsky, a member of the Bar of this Court, hereby certify that on the 16th day of October 2002, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed, first class postage prepaid, to:

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No. 02-479

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2002

MEDICAL BOARD OF CALIFORNIA,
Petitioner

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Respondent

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No. 02-479

(3)

In The Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

vs.

MICHAEL J. HASON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed September 23, 2002
Certiorari Granted November 18, 2002

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U.S. District Court
Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 99-CV-4264

Michael J Hason v. Med Bd of State CA, et al
[Note-Relevant entries only are included; abbreviations replaced with full words]

Filed: 04/21/99 Assigned to: Judge A. Howard Matz
Jury demand: Plaintiff Referred to: Magistrate Judge Robert N. Block

Demand: $9,999,000

DATE	DOCKET ENTRY
4/21/99	CIVIL RIGHTS COMPLAINT filed
4/21/99	NOTICE and ORDER of Reference to Magistrate Judge Margaret A. Nagle [Entry date 04/22/99]
8/31/99	NOTICE OF MOTION AND MOTION by defendant Med Bd of State CA, defendant Dept of Consumer to dismiss complaint; motion hearing set for 10:00 9/28/99 [Entry date 09/03/99]
10/4/99	MINUTES: resetting hearing on motion to dismiss to 10/26/99; plaintiff shall file and serve his opposition to motion on or Before 10-12-99; defendant State of CA shall file and serve its reply if any on or before 10-19-99 [Entry date 10/05/99]
10/12/99	OPPOSITION by plaintiff Michael J Hason to motion to dismiss [Entry date 10/15/99]
10/19/99	REPLY TO OPPOSITION by defendant State of California to motion to dismiss complaint [Entry date 10/20/99]

10/26/99 MINUTES: Re: defendant's motion to dismiss. The case is called. Audrey Egan, Deputy Atty General appears for defendant Medical Board of California. Plaintiff is not present. The court takes the matter under submission. [Entry date 10/26/99]

11/2/99 EX PARTE APPLICATION filed by plaintiff Michael J Hason to decide motion on papers. [Entry date 11/03/99]

11/4/99 MINUTES: denying ex parte motion to decide mot on papers the application however is DENIED to the extent that it seeks to have the court disregard defendant's reply or to grant plaintiff leave to file a sur-reply [Entry date 11/05/99]

2/1/00 REPORT AND RECOMMENDATION issued by Magistrate Judge Robert N. Block [Entry date 02/04/00]

2/2/00 NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Robert N. Block and Lodging of Proposed Judgment and Order [Entry date 02/04/00]

2/22/00 OPPOSITION by plaintiff Michael J Hason to Report and Recommendation [Entry date 02/24/00]

3/31/00 ORDER by Judge A. H. Matz adopting findings, conclusions and recommendations of United States Magistrate Judge [Entry date 04/03/00]

4/25/00 JUDGMENT: by Judge A. H. Matz. ADJUDGED that this action is dismissed w/o prejudice as to the individual defendants in their individual capacities and with prejudice as to the two named state agencies and the

individual defendants in their official capacities. terminating case [Entry date 04/27/00]

4/28/00 NOTICE OF APPEAL by plaintiff Michael J Hason to 9th C/A from Dist. Court order filed 3/31/00 [Entry date 05/01/00]

5/19/00 NOTIFICATION by Circuit Court of Appellate Docket Number appeal 00-55784 [Entry date 05/19/00]

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 00-55784 Filed: 5/11/00
Other civil rights (Fed)
Hason v. Medical Board, et al, et al
Appeal from: Central District of California, Los Angeles

00-55784 Hason v. Medical Board, et al.
[Note – Relevant entries only are included; abbreviations replaced with full words]

5/11/00	DOCKETED CAUSE AND ENTERED APPEARANCE OF APLT IN PRO PER & COUNSEL FOR APPELLEES.
8/30/00	Filed original and 15 copies Appellant Michael J. Hason opening brief
10/12/00	Filed original and 15 copies appellee Medical Board
11/15/00	Filed original and 15 copies Michael J. Hason in reply brief
3/5/01	Filed order (Appellate Commissioner) Upon review of the record and the briefing in this appeal, this court has determined that the appointment of counsel in this appeal would benefit the court's review.. The clerk shall enter and order appointing pro bono counsel to represent appellant for purposes of this appeal only . . . The clerk shall establish a supplemental briefing schedule. The appeal is stayed pending further order.
4/16/01	Filed order – Pursuant to this court's 3/5/01 order appointing pro bono counsel for appellant, Erwin Chemerinsky, is hereby appointed to represent appellant in this appeal. This order shall be served on appellant as well as counsel for

appellee. Supplemental. briefing shall proceed as follows: appellant supplement brief is due 6/12/01; appellees supplemental. answer brief. is due 7/12/01 and appellant's optional reply brief. is due 7/26/01. This appeal shall be calendared for oral are in Pasadena on the next available calendar after briefing.

6/13/01 Received Appellant Michael J. Hason supplemental brief in

8/14/01 Filed original and 15 copies Appellee Medical Board supplemental brief

8/28/01 CALENDARED: PASADENA – Nov 6 2001 1:30 pm Courtroom 3

9/5/01 Filed original and 15 copies Michael J. Hason reply brief,

11/6/01 ARGUED AND SUBMITTED TO ALFRED T. GOODWIN, J. C. WALLACE, SIDNEY R. THOMAS

11/8/01 Filed Michael J. Hason additional citations, served on 11/7/01

2/12/02 FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Alfred T. GOODWIN, author; J. C. WALLACE; Sidney R. THOMAS.) FILED AND ENTERED JUDGMENT.

2/26/02 Received original and 50 copies Appellee Medical Board petition, for rehearing with suggestion for rehearing en banc, deficient: no cert of compliance, footnotes too small., served on 2/25/02 . Notified counsel.

3/4/02	Filed Medical Board motion to file late petition for rehearing/en banc. served 3/1/02
3/4/02	Received REPLACEMENT original and 50 copies Appellee Medical Board petition, for rehearing with suggestion for rehearing en banc
3/8/02	Filed order (Alfred T. GOODWIN,): The appellee's motion to file late petition for rehearing en banc is granted.
3/8/02	Filed original and 50 copies Appellee Medical Board petition for rehearing with suggestion for rehearing en banc 15 .pages,
3/18/02	Filed order (Alfred T. GOODWIN, J. C. WALLACE, Sidney R. THOMAS): The appellant is requested to file a response to the petition for rehearing en banc within 21 days of the date of this order. The response shall not exceed 15 pgs in length.
4/2/02	Received Appellant Michael J. Hason response to petition for en banc rehearing served on 4/1/02 Deficient: footnotes too small – notified counsel
4/10/02	Filed Appellant Michael J. Hason response opposing petition for en banc rehearing served on 4/9/02
6/26/02	Filed order (Alfred T. GOODWIN, J. C. WALLACE, Sidney R. THOMAS): The petition for rehearing en banc is denied.
7/5/02	MANDATE ISSUED

BILL LOCKYER, Attorney General
of the State of California
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Attorneys for the State of California (erroneously sued as The Medical Board of the State of California and Department of Consumer Affairs of the State of California)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, Plaintiff, v. MEDICAL BOARD OF THE STATE OF CALIFORNIA AND DEPARTMENT OF CONSUMER AFFAIRS, et al., Defendants.	CASE NO. **CV 99-04264 NM (MAN)** NOTICE OF HEARING; MOTION TO DISMISS COMPLAINT [F.R.C.P. Rule 12(b)(6)]; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [REQUEST FOR JUDICIAL NOTICE FILED CONCURRENTLY HEREWITH] DATE: SEPTEMBER 28, 1999 TIME: 10:00 A.M. DEPT.: D (Filed Aug. 31, 1999)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **September 28, 1999,** at **10:00 a.m.** or as soon thereafter as counsel may be heard in **Courtroom D** of the above-entitled court, located at **312 N. Spring Street, Los Angeles, CA 90012-4793**, Defendant State of California will move this court for an order under Federal Rules of Civil Procedure, Rule 12(b), dismissing the Complaint and each of the causes of action alleged therein as to Defendant State of California on the grounds that the Complaint fails to state any facts which would support any cognizable legal theory by which the State of California would be liable.

This motion is made following the conference of counsel pursuant to Local Rule 7.4.1. which took place by telephone on August 19, 1999.

This motion will be based on this motion and notice of motion, the memorandum of points and authorities filed in support thereof, on such oral and documentary evidence as shall be introduced at the time of the hearing, and on all papers and pleadings on file herein.

MOTION TO DISMISS

Defendant State of California moves to dismiss the Complaint on the following specific grounds:

1. In so far as the Complaint purports to state any causes of actions for constitutional deprivations, no cognizable interest recognized by a specific constitutional provision has been identified;

2. The State of California cannot be sued under 42 USC Section 1983 for damages; and

3. In so far as the Complaint purports to state any state law causes of action, such causes of action are barred by Plaintiff's failure to comply with claim presentations requirements set forth in *California Government Code* Sections 900 *et seq.*

WHEREFORE, Defendant State of California prays as follows:

1. That the Complaint and each claim for relief alleged therein be dismissed as against Defendant State of California;

2. That Plaintiff be ordered to take nothing from moving Defendant;

3. That judgment be entered in favor of moving Defendant; and

4. For such other relief as the court deems just.

Dated: August 31, 1999

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
AUDREY EGAN,
Deputy Attorney General

By: /s/ Audrey Egan
AUDREY EGAN

Attorneys for the State of California
(erroneously sued as The Medical
Board of the State of California and
Department of Consumer Affairs of
the State of California)

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Plaintiff filed a lengthy Complaint naming as defendants the Medical Board of the State of California, the Department of Consumer Affairs of the State of California, and several State officers both individually and in their official capacities. The basis of the Complaint appears to arise from the State Medical Board's denial of Plaintiff's medical license based upon Plaintiff's mental illness.

The Complaint appears to attempt to allege constitutional violations, specifically, violations of the 14th Amendment equal protection clause and violations of the 14th Amendment due process clause as well as state law violations.

As set forth herein below, Plaintiff's Complaint fails to adequately allege any cognizable legal theories against moving Defendant.

ARGUMENT

I.

THE COMPLAINT FAILS TO ALLEGE THAT ANY COGNIZABLE CONSTITUTIONAL RIGHT WAS VIOLATED

In order to claim deprivation of a constitutional right, Plaintiff must identify a cognizable interest recognized by a specific constitutional provision was violated. *Baker v. McCollan* (1979) 443 US 137, 99 S.Ct 2689, 61 L.Ed2d 433 (detention for three days over New Year's weekend under facially valid arrest warrant does not constitute constitutional deprivation of liberty without due process); *Johnson*

v. Barker (9th Cir 1986) 799 F.2d 1396 (defamation resulting in damage to plaintiff's reputation alone, allegations of malicious prosecution, and mere negligent conduct do not rise to level of constitutional tort); *Daniels v. Williams* (1986) 474 US 327, 106 S.Ct 662, 88 L.Ed.2d 662 (prison official's negligent conduct causing unintended loss of or injury to life, liberty, or property does not implicate due process clause).

Plaintiff's Complaint makes general assertions of constitutional violations but fails to identify any cognizable interest recognized by a specific constitutional provision.

Plaintiff states that Defendants violated the 14th Amendment Equal Protection Clause but fails to show that he is within a protected class. Moreover, Plaintiff states in paragraphs 3 and 6 of his Complaint that the defendants proceeded under statutes including a statute that states that a license to practice medicine may be denied for the reason of mental illness.

The Complaint also alleges 14th Amendment due process violations. However, paragraph 1 of the Complaint states that Plaintiff appealed his license denial, there was a hearing, and later, Plaintiff petitioned for reconsideration. It appears from the Complaint that Plaintiff received due process. *Hudson v. Palmer* (1984) 468 US 517, 533, 104 S.Ct 3194, 3203, 82 L.Ed.2d 393, 407.

Other constitutional violations mentioned in the Complaint such as the 13th Amendment privileges and immunities clause and federal acts such as the Americans with Disabilities Act and the Rehabilitation Act similarly fail because they are insufficiently plead in the Complaint.

While the Complaint goes into detail about how Plaintiff believed he was wronged, it fails to identify what cognizable interest recognized by a specific constitutional provision was violated. Having failed to meet this threshold question, as to any purported federal claims, Plaintiff's Complaint fails to state any cognizable legal theory against moving Defendant.

II.

THE STATE OF CALIFORNIA CANNOT BE SUED UNDER 42 USC SECTION 1983 BECAUSE IT IS NOT A "PERSON" UNDER SUCH STATUTE

42 USC Section 1983 also called the federal Civil Rights Act of 1871, permits an individual to maintain a cause of action against a person acting under color of state law who violates the individual's constitutional or other federally protected rights. All of Plaintiff's alleged federal claims come under 42 USC Section 1983.

It is well settled that neither the State of California nor state officials sued in their official capacity can be sued under 42 USC Section 1983. The State and state officials are not considered persons within the meaning of 42 USC Section 1983. *Hafer v. Melo* (1991) 502 US ___, 112 S.Ct 358, 116 L.Ed.2d 301; *Will v. Michigan* (1989) 491 US 58, 109 S.Ct 2304, 105 L.Ed.2d 45.

Consequently, Plaintiff's alleged federal causes of action must fail as against moving Defendant.

III.

IN SO FAR AS THE COMPLAINT ALLEGES ANY STATE CAUSES OF ACTION, SUCH STATE CAUSES OF ACTION ARE BARRED BY PLAINTIFF'S FAILURE TO COMPLY WITH CLAIMS PRESENTATION REQUIREMENTS

It is well-established that before a complaint for damages can be filed against the State of California or against a state employee acting within the course and scope of employment, the plaintiff must first comply with specific claim presentation requirements set forth in *California Government Code* sections 900 *et seq*. The claim presentation requirement is a prerequisite to filing a lawsuit even when the lawsuit is filed in federal court. *California Government Code* section 945.4; *State ex rel Dep't of Trans. v. Superior Court* (1984) 159 Cal.App.3d 331, 338; *Mazzola v. Feinstein* (1984) 154 Cal.App.3d 305, 310; *Pacific Tel. & Tel. Co. v. County of Riverside* (1980) 106 Cal.App.3d 183, 188; *San Leandro Police Officers Ass'n v. City of San Leandro* (1976) 55 Cal.App.3d 553.

Plaintiff must file such claim within 6 months of accrual of his cause of action. *California Government Code* Section 911.2. According to the Complaint at paragraph 1, Plaintiff's cause of action accrued on April 24, 1998, at the very latest. To date, Plaintiff has not filed a claim. (See Request for Judicial; Notice filed concurrently herewith). The time in which Plaintiff could have filed a late claim application has also expired. *California Government Code* Section 911.4.

Plaintiff has not and cannot comply with claims presentation requirements. Therefore, Plaintiff is barred

from bringing any of these state causes of action against moving Defendant.

CONCLUSION

For the foregoing reasons, moving Defendant requests that its Motion to Dismiss be granted and that this case be dismissed in its entirety as to moving Defendant.

Dated: August 31, 1999

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
AUDREY EGAN,
Deputy Attorney General

By: /s/ Audrey Egan
AUDREY EGAN

Attorneys for the State of California (erroneously sued as The Medical Board of the State of California and Department of Consumer Affairs of the State of California)

[Declaration Of Service Omitted In Printing]

Michael J. Hason, M.D.
Plaintiff in pro per
1710 NW 87 Ave.
Plantation, FL 3322
(954) 424-4082

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Michael J. Hason, M.D., Plaintiff in pro per. v. The Medical Board of the State of California; Dept. of Consumer Affairs of the State of California; Arlene Adams, the Director of the Dept. of Consumer Affairs of the State of California, Neil Fippin, Individually and as the Manager, Licensing Program of the Medical Board of the State of California; Melinda Acosta, Individually and as an official of the Medical Board of the State of California; Ron Joseph, individually and as Executive Director of the Medical Board of the State of California and as Director of the Dept. of Consumer Affairs of the State of California; Bruce Hasenkamp,	CV 99-04264 NM (MAN) Plaintiff's Opposition to State of California's Motion to Dismiss (Filed Oct. 12, 1999)

Individually and as President of the Division of Licensing of the Medical Board of the State of California; Dr. Ira Lubell, Individually and as Pres. of the Division of Medical Quality of the Medical Board of the State of California; Dr. Carole H. Horvitz, Dr. Anabel A. Imbert, Dr. Raquel D. Arias, Dr. [Illegible] D. Bertakis, Dr. Jack Bruner, Daniel Livingston, Karen McElliot, Dr. Alan E. Shumacher and Kip S. Skidmore, Individually and as Members of the Medical Board of the State of California's Division of Medical Quality; Dr. Thomas A. Joas, Karen McElliot and Bernard Alpert, Individually and as Officers of the Medical Board of the State of California and its Div. of Licensing Michael I. Sidley and Dr. Raja Toke, Individually and as Executives of the Medical Board of the State of California's Division of Licensing; the State of California; and Senior Investigator, Medical Board of California,

Defendants

AFFIDAVIT

1. I, Michael J. Hason, am the Plaintiff in the within action and am thoroughly familiar with the underlying facts mentioned below.

2. I applied for a medical license in about the Spring of 1995 and met with what I would describe as administrative resistance by the Medical Board of California (MB) to granting the application. After a long drawn out set of proceedings, post a Petition for Reconsideration, they finally denied the application in about April of 1998. Along the way the MB acted in ways that violated my rights under the Americans With Disabilities Act and other statutes and case law. Apparently, the State of California feels that it is the proper party to answer for the MB's acts.

3. The Plaintiff was a resident in Neurology at the VA Medical Center, W. Los Angeles, at the time he applied for a medical license to the MB. He had some difficulties during his medical training relating to the suffering of depression(s) which had caused him to resign from training program(s), so as to afford a complete respite and allow full recovery, before proceeding with any training. By the Plaintiff's application, the MB was alerted to this fact and immediately began aggressive inquiries. They requested a complete history of Plaintiff's problem with depression, despite the fact that Plaintiff had not suffered a serious depression since 1992. Although they were aware that records might date back to 1970, they requested all medical records, of an concerning the depression. They did not ask for summaries, they wanted everything, including doctor's notes covering periods greater than one year in the nature of weekly psychotherapy sessions where one inner and most private thoughts were probed, supposedly in a confidential setting. Plaintiff, though fearful of rejection by the MB, informed the MB he could not comply fully with their directive. Plaintiff did foolishly provide them

with more medical information than appropriate, but not everything. The MB then informed Plaintiff that he would be required to see their psychiatric consultant for a few hours, plus submit to some testing, if he could afford to pay them $2000.00. The testing was arranged to be done with one physician and then switched to a new one, a Dr. Michael Meek.

4. This Dr. Meek received amongst his materials orienting him to the case, (later seen by Plaintiff during discovery on administrative appeal), an MB internal memo by Chief Investigator Thornton, describing Dr. Hason as a "narcissistic jerk" and opining that the only way to block Plaintiff's right to a license would be to get him into a consultation exam. Further, they chose a biased physician, in that according to Meek's testimony at a later hearing, the MB had not paid him in the one case where he found the doctor-applicant safe to practice medicine, new to the practice of forensic medicine. Meek was also new to the practice of forensic psychiatry, but had an extensive history of involvement in government and political type matters in California.

5. That Meek was trying to help the MB block Dr. Hason's application for a license should have been obvious to Plaintiff, but Plaintiff proceeded in good faith. Meek's style was to try and get some dirt and then try to end off without getting any of the relevant circumstances that would explain how the dirt was really benign and not significant evidence for any pathology. Meek also administered a test to Plaintiff which was not appropriately geared to the setting and obtained releases for collateral releases, specific releases, with conditions. Meek then contacted different people, did not

contact anyone who he thought might be favorable to plaintiff and violated the conditions that limited the use of the releases. Meek then discussed matters, without a release with the interviewees and obtained or fabricated false and defamatory information about Plaintiff of a type prohibited to him by the ADA. He also fabricated an accusation against Dr. Hason regarding abandoning patients in 1994 while patient was a resident at SUNY Stony Brook and stated that James Davis, M.D., Chairman of the Neurology Dept. there had told him about it. Meek testified about the abandonment issue as well at the administrative hearing. Meek's also diagnosed Plaintiff as having a narcissistic personality disorder. This phony diagnosis was the linchpin of his phony argument that Dr. Hason would not be able to muster enough insight to act appropriately and get care if he should get depressed again. That diagnosis was described as "clinically reckless" by Dr. David Glaser, a psychiatrist well known to the MB and its attorney. He is held in the highest regard by them and is a member of their panel of psychiatric experts.

6. The Plaintiff's application was initially denied in Aug. of 1996 under a statute that gave as its basis "mental illness." Of course, the MB would have to pay attention to such a condition, but the statute was overbroad, especially as applied to Plaintiff and did not reflect any consideration of the restraints imposed by the ADA and the equal rights clauses. The MB then took its time about issuing a Statement of Issues, delivered same about Dec. of 1996. That Statement's recital of the MB's case was fraudulent and insufficient in law, in that it basically argued that Dr. Hason would not act appropriately in he became depressed. The Board then

delayed the proceedings by refusing to provide a hearing until about May 1997.

7. In the Interim, under great stress, including but not limited to financial stress, the false and abusive report issued by Meek which was seen via discovery, the cruel accusation of mental illness in the denial document of Aug. 1996, Dr. Hason fell ill with depression. He was forced to move to Florida in May 1997 and was in recovery when he attended his hearing in Sept. of 1997. The MB, at the hearing, continued to push points that any basic investigation would prove false, including the patient abandonment issue and the bogus narcissistic personality diagnosis, intentionally confusing the Administrative Law Judge, Jaime Roman (ALJ).

The ALJ, stated that the case was difficult for him, that he like Plaintiff, but he felt that Plaintiff needed to continue therapy (Plaintiff had been in therapy only three months at the time of the hearing), presumably for at least six months as argued by Dr. Meek and reapply for a license thereafter. Although the subject of the restraints of the ADA was raised during the hearing, briefly, the ALJ made no determination that the danger to the public safety that he identified rose to the level required by the ADA, nor did he discuss whether it would be reasonable or not for the MB to accommodate Dr. Hason by directing him to remain in therapy and/or directing to work under some form of supervision or reportage to an MB appointed monitor.

8. After further extensive delay, the MB served the decision of the ALJ and Plaintiff wrote a Petition for Reconsideration. Plaintiff's points regarding the applicability of the ADA, the introduction of false data by

Meek such as the patient abandonment issue were not heeded. The Petition was denied after a cursory review by MB's attorney, despite the fact that Plaintiff had successfully completed a therapeutic course and a rehabilitation during more than six months in outpatient treatment. The treating physician and psychotherapist in Florida stated unequivocally that Dr. Hason's depression had lifted, that he had excellent insight into his entire medical problem, that he was compliant and that he had no narcissistic or other personality disorder.

9. The Plaintiff is an individual protected by the ADA because he is disabled with a susceptibility to depression which when it occurs acutely causes Plaintiff difficulties with accomplishing major life activities such as working effectively. The position of the MB in denying Plaintiff's application for a license would be consistent with placing Plaintiff in that class of individuals. The MB and/or the State of California is a covered government entity under Title II of the ADA. The Plaintiff attempted to file an administrative claim under the ADA against the MB and other defendants, but was correctly informed by the EEOC that they could not accept same and that it was not a prerequisite to litigation in the courts. Plaintiff had appeared to complain at the EEOC office prior to the running of 180 days after the final denial of Plaintiff's application for a license, post the administrative hearing, which Order by the MB became effective in about April 1998.

WHEREFORE, the Plaintiff requests that this Court deny the motion to dismiss by the State of California of any claims made under the ADA and/or other claims made and notices given in the Complaint and

permit the Plaintiff the amend same, if necessary, to meet the minimal acceptable standards of pleading in this Court and to grant further relief just in the premises.

Sworn to before me on Oct. 10, 1999 under penalties of perjury at Plantation, FL

/s/ Glen Lindenfeld
Notary

/s/ Michael J. Hason, M.D.
Plaintiff, in pro per

Notary Public GLEN LINDENFELD
State of Florida
My Comm. Exp: 10/22/99
Comm#: CC503899

POINTS AND AUTHORITIES

I. THE STATE OF CALIFORNIA IS LIABLE TO PLAINTIFF BECAUSE IT VIOLATED HIS RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT.

1. The Defendant The State of California (SC) has appeared in this action and has claimed that service against the Medical Board of the State of California (MB) and/or the Dept of Consumer Affairs were mistaken. The SC implies that they are the proper entity to be sued if either the state agency or department officials have violated Plaintiff's rights under the Americans With Disabilities Act (ADA) or the Rehabilitation Act (federal statutes). The Defendant SC then makes a blanket statement in their motion papers that any violation of the ADA is improperly pleaded, but they do not elaborate at all and so the Plaintiff must request

leave to re-plead this cause of action, if a deficiency is identified. Amending of the Complaint would be appropriate as Plaintiff can cite numerous arguable violations of these civil rights statutes made by officials of the MB and its agents. The Plaintiff can identify the specific constitutional rights that have been violated, but this identification is not necessary, as the federal statutes violated reformulate the protection of these rights under the authority of Congress to legislate consistent with the mandates of the Constitution. The Plaintiff, additionally, is disabled and that class pursuant to the decision of Congress and the Courts is an identifiable class worthy of protection under the equal protection clause of the 14th Amendment and any other relevant Constitutional provisions.

2. Plaintiff's attached affidavit specifies some of the violations of his ADA rights by the agents of the MB and is adopted here as if set forth more fully. These subclaims make out at least the minimum of facts that were or could be pleaded against Defendant and satisfy the rules at the pleading stage and resist a motion to dismiss for failure to state a claim.

3. Direct reliance on certain Constitutional provisions such as the Privileges and Immunities Clauses are potentially barred by the 11th Amendment as far as the Defendant SC is concerned. They are not protected, however, from the reaches of the ADA, which presumably was enacted to further and encourage the proper administration of law and justice under the 14th Amendment. It has been held that if Congress chooses to makes its laws applicable to States, when proceeding in a 14th Amendment manner, it has the power to do so. It has been held that States or their licensing agencies are

entities governed by the ADA and it has been held that the 11th Amendment is not a bar to an action under the ADA. This result is not altered by a recent 9th Circuit decision holding that Title II does not cover employment cases. In that case, the Plaintiff should have exhausted his administrative remedies appropriately before filing his federal case. In the within action, a filing with the EEOC would be not correct, and the EEOC properly refused to accept such a filing from the Plaintiff although he appeared before them in less than 180 days after the MB denied his application for a medical license. This follows from the dictates of Title II of the ADA. Cf. *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. March 18, 1999)

4. The Plaintiff, Michael J. Hason, has alleged that he is protected by the ADA. This is true, because he is disabled in the following sense. He has suffered recurring depressions that have at times significantly impaired his ability to function in major activities of life. The MB took the position that the disability was of a nature to preclude licensure as a physician, presumably because of a combination of danger to the public and a non-stated determination that any reasonable accommodation would not alter their conclusion.

5. It is possible that the Plaintiff has not clearly pled the elements of his ADA claim with sufficient clarity so far, although many of the underlying facts and considerations were included in the Complaint. The SC had more than adequate notice of the factors that would go into a properly pleaded ADA cause of action under the circumstances of this case and amendment, if needed, rather than dismissal, would be the appropriate next step in these proceedings.

IN CONCLUSION

The Plaintiff requests that the motion to dismiss of the State of California be denied in relation to the ADA and/or any claims supported by other laws and facts noticed by the language of the Complaint and that the Plaintiff be allowed to amend his Complaint, if needed to meet minimum pleading requirements and that this Court grant any further relief justified in the premises

Dated: Oct. 10, 1999 at
Plantation, FL

/s/ Michael Hason
Michael J. Hason, M.D.
Plaintiff, in pro per

[Affidavit Of Service Omitted In Printing]

BILL LOCKYER, Attorney General
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Attorneys for the State of California (erroneously sued as The Medical Board of the State of California and Department of Consumer Affairs of the State of California)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, Plaintiff, v. MEDICAL BOARD OF THE STATE OF CALIFORNIA AND DEPARTMENT OF CONSUMER AFFAIRS, et al., Defendants.	CASE NO. **CV 99-04264 NM (MAN)** DEFENDANT STATE OF CALIFORNIA'S REPLY TO PLAINTIFF'S OPPOSITION TO ITS MOTION TO DISMISS THE COMPLAINT DATE: OCTOBER 26, 1999 TIME: 10:00 A.M. DEPT.: D

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Defendant State of California (erroneously sued as The Medical Board of the State of California and Department of

Consumer Affairs of the State of California) replies to Plaintiff's Opposition to its Motion to Dismiss the Complaint as follows:

Plaintiff appears to concede that all causes of action in his Complaint should rightfully be dismissed except for his alleged violation of his rights under the Americans With Disabilities Act ("ADA"). For the following reasons, Plaintiff's ADA claim should be dismissed along with all other claims and Plaintiff should not be allowed to amend his Complaint.

I.

PLAINTIFF CANNOT STATE A VALID ADA CLAIM BECAUSE HE IS NOT A "QUALIFIED INDIVIDUAL" FOR PURPOSES OF THE ADA

The ADA provides that:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. Section 12132(2).

However, a "qualified individual with a disability" is defined, in pertinent part, as:

> An individual with a disability who, with or without reasonable modifications to rules, policies or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. Section 12131(2).

Even if, for purposes of argument, the State Medical Board's refusal to issue Plaintiff a medical license could be considered to be a "service" denied to Plaintiff or a "program or activity" from which Plaintiff was excluded, Plaintiff could not bring a valid ADA claim because he is *not* a "qualified individual" as defined by the ADA.

In *Alexander v. Margolis* 921 F.Supp. 482 (1995) the state medical board revoked and refused to reinstate the medical license of a former physician who suffered from a bipolar disorder. The plaintiff sued for, amongst other things, violation of the ADA. The court found that the plaintiff was not a qualified individual with a disability under the ADA and dismissed the entire complaint. The court opined as follows:

> The very nature of the police powers exercised by state boards of medicine require the state to discriminate on the basis of, amongst other considerations, a mental condition harmful to the public's safety. By the very nature of the practice of medicine, given the physician's necessary independence to "practice" his art, no reasonable modification can be made to a policy of restricting medical practice to those without evidence of mental disabilities . . . The Board cannot exercise its duty without the discretion to consider the impact of a mental disability upon one's ability to practice with reasonable skill and safety. The danger of irreparable harm to the public is too great to deny the Board such discretion. To require otherwise would be unreasonable. (at pg. 488).

Alexander v. Margolis 921 F.Supp. 482 (1995) is essentially the same as our present case. Plaintiff's application for a medical license was denied because of his

mental illness, which, as set forth in the Complaint, had been diagnosed as a narcissistic personality disorder. Plaintiff states in his Complaint that Defendants denied his license application pursuant to statutes. The State Medical Board has a duty to deny medical licenses to applicants that it believes will pose a danger to the public.

Plaintiff, because of his mental condition, is not a qualified individual under the ADA and therefore, cannot sue for alleged ADA violations. Consequently, Plaintiff's ADA cause of action should be dismissed. Plaintiff should not be permitted to amend this cause of action because he cannot amend his Complaint so as to state a viable ADA cause of action.

II.

LEAVE TO AMEND THE COMPLAINT SHOULD NOT BE GRANTED BECAUSE PLAINTIFF CANNOT AMEND HIS COMPLAINT TO STATE VIABLE CAUSES OF ACTION

As to Plaintiff's allegations of constitutional violations, even if Plaintiff could state cognizable constitutional violations in his Complaint, Defendant is entitled to quasi-judicial immunity because the Medical Board was acting as a tribunal performing a judicial function. *Watts v. Burkhart, M.D.* 978 F.2d 269, 275 (1992) (quoting *Burns v. Reed,* 500 US 478, 490; 111 S.Ct. 1934, 1941; 114 L.Ed.2d 547 (1991)). Moreover, Defendant would also be entitled to qualified immunity because its actions consisted of government officials performing discretionary functions whose conduct did not violate any clearly established statutory or constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S.Ct. 2727, 2738; 73 L.Ed.2d 396 (1982).

Concerning Plaintiff's state causes of action, Plaintiff concedes that he failed to file a proper State board of Control claim and is therefore precluded from bringing any state causes of action against Defendant.

Consequently, Plaintiff should not be granted leave to amend his Complaint.

CONCLUSION

For-the foregoing reasons, Defendant asks that its Motion to Dismiss be granted, that Plaintiff be denied leave to amend his Complaint, and that the entire Complaint be dismissed against Defendant with Prejudice.

Dated: October 15, 1999

Respectfully submitted,

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Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

v.

MICHAEL J. HASON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, THE STATES OF ALABAMA, DELAWARE, HAWAII, NEBRASKA, TENNESSEE, TEXAS AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is Congress' attempt to abrogate the States' sovereign immunity for claims based on Title II of the Americans with Disabilities Act a valid exercise of Congress' power to enforce the Fourteenth Amendment?

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INTEREST OF AMICI

The Commonwealth of Virginia and the States of Alabama, Delaware, Hawaii, Nebraska, Tennessee, Texas and Utah (collectively "the States") are sovereign States of the Union. As such, they have an overwhelming interest in the preservation of the principles of dual sovereignty, which are "a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002). More specifically, they have an interest in insuring that Congress' power to abrogate the sovereign immunity of the States is circumscribed in a manner that recognizes the extraordinary nature of the act.

In this brief, submitted in support of the Petitioner, the Medical Board of California, the States argue that Congress' attempt to abrogate sovereign immunity for claims based upon Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 ("ADA"), is unconstitutional. The States take this position for two reasons. First, the evidence that the States themselves were engaged in unconstitutional behavior that required Title II of the ADA as a remedy is insufficient to support abrogation. The statutory text contains no explicit findings of unconstitutional activity, the legislative history is largely devoid of such evidence, and there is a dearth of judicial documentation of contemporaneous constitutional violations. Second, even if there were evidence of constitutional violations by the States that supported a legislative response, the remedy enacted by Congress, abrogation of the sovereign immunity of *all* States for *all* time, would be disproportionate to the constitutional violations Congress sought to address. A proportionate response would abrogate the sovereign immunity of those States where the history and

pattern of violation occurred and would be of some limited duration calculated to permit periodic review of the necessity of so extreme a remedy.

No State is, or should be, allowed to engage in unconstitutional discrimination against the disabled with impunity. Where States pursue a policy or practice of unconstitutional discrimination, federal courts may issue declaratory and injunctive relief.[1] *See Ex Parte Young*, 209 U.S. 123 (1908). Nor do the States contend that they should never be liable for money damages for violations of Title II of the ADA. Sovereign immunity does not apply to suits brought by the United States, and a State, in the exercise of its sovereign powers, may waive its sovereign immunity to private suits for damages under Title II of the ADA. Nor do the States take the position that it is impossible for Congress to abrogate their sovereign immunity. If a State engages in a pattern of unconstitutional discrimination, then it is arguably appropriate for Congress to abrogate that State's sovereign immunity, at least for a period of time. The States simply explain that this particular attempt by Congress, to abrogate the States' sovereign immunity for claims based on Title II of the ADA, is unconstitutional.

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[1] Of course, there is a difference between a policy or practice of *unconstitutional* discrimination and a violation of statutory requirements under Title II.

ARGUMENT

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), this Court reaffirmed the basic principle that Congress, acting pursuant to § 5 of the Fourteenth Amendment, may enact legislation that abrogates constitutional sovereign immunity for claims based on a particular statute. *Seminole Tribe*, at 58-65. However, because the power to effectively nullify constitutional sovereign immunity is so extraordinary, in order to do so Congress must (1) unequivocally express its intent to abrogate in the text of the statute, and (2) act pursuant to § 5 of the Fourteenth Amendment. *Id.* at 56-59. Unless both conditions are satisfied, Congress' attempt to abrogate the States' sovereign immunity is invalid. *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 824 (8th Cir. 1998), *cert. denied, sub nom. United States v. Regents of the Univ. of Minn.*, 528 U.S. 1114 (2000).

In the present case, Congress unequivocally expressed its intent to abrogate sovereign immunity in the text of Title II of the ADA. *See* 42 U.S.C. § 12202; *see also Wessell v. Glendening*, 306 F.3d 203, 208 (4th Cir. 2002); *Thompson v. Colorado*, 278 F.3d 1020, 1025 (10th Cir. 2002), *cert. denied*, 122 S. Ct. 1960 (2002) (both expressly holding that Congress has made its intention clear). Thus, the critical issue becomes whether or not Congress acted pursuant to § 5 of the Fourteenth Amendment. This question requires an examination of the constitutional origins of the *statute purporting to abrogate sovereign immunity*. The mere fact that Congress has invoked its Fourteenth Amendment powers, however, does not mean that it has acted in accordance with the Fourteenth Amendment. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 637-38 (1999). Rather, determining whether an attempt to abrogate sovereign immunity is

valid requires application of the "congruence and proportionality" test set forth in *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

The "congruence and proportionality" test involves three questions. *See generally Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-74 (2001). *See also Wessell*, 306 F.3d at 209 (describing the inquiry as three questions). First, this Court must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, once this Court has "determined the metes and bounds of the constitutional right in question," it will examine "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States. . . ." *Garrett*, at 368.[2] In assessing whether Congress has identified unconstitutional conduct, courts look at judicial opinions, not at the pronouncements of Congress. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000); *Flores*, 521 U.S. at 519. Third, if there is a pattern of constitutional violations by the States identified, this Court determines whether the abrogation of sovereign immunity constitutes a proportionate response to the constitutional violations. *Florida Prepaid*, 527 U.S. at 646.

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[2] In making this determination, this Court must recognize that (1) conduct that may violate federal law does not necessarily violate the Constitution, *Kimel*, 528 U.S. at 83-84, (2) conduct by private actors or society in general cannot be ascribed to the States, *Id.* at 90-91, (3) unconstitutional conduct by governmental entities that are not considered arms of the State cannot be ascribed to the State, *Garrett*, 531 U.S. at 368-69, and (4) even if there is unconstitutional conduct by the States, the fact that one State or even several States have violated the Constitution does not constitute a pattern of constitutional violations by the States. *Kimel*, 528 U.S. at 90.

I. THE CONSTITUTIONAL RIGHT AT ISSUE IS THE RIGHT OF THE DISABLED TO BE FREE FROM ARBITRARY OR IRRATIONAL EXCLUSION FROM SERVICES, BENEFITS, AND PROGRAMS PROVIDED BY THE STATES.

With respect to the first inquiry, the nature of the constitutional right at issue is clear. This Court observed:

> [T]he result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. . . . If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.

Garrett, 531 U.S. at 367-68. "In the context of Title II, therefore, the constitutional right may be identified as follows: disabled people have a constitutional right not to be subject to arbitrary or irrational exclusion from the services, programs, or benefits provided by the state." *Wessell*, 306 F.3d at 210. *See also Garcia v. State Univ. of N.Y. Health Sci. Ctr.*, 280 F.3d 98, 109 (2nd Cir. 2001) (relying on the same purpose); *Thompson*, 278 F.3d at 1030 ("[A] state violates the Equal Protection Clause if it makes distinctions between the disabled and nondisabled without a rational justification.").

II. CONGRESS DID NOT IDENTIFY A HISTORY AND PATTERN OF UNCONSTITUTIONAL DISCRIMINATION BY THE STATES.

This Court has made it clear that Congress must identify a pattern of unconstitutional conduct by the States in order to support an abrogation of sovereign

immunity, yet this Court has provided little explicit guidance as to what materials are relevant in such an inquiry. *Wessell*, 306 F.3d at 210. For example, in *Flores*, this Court reviewed testimony in congressional committee hearings. *See Flores*, 521 U.S. at 530-31. However, in *Garrett*, this Court declined to consider "unexamined, anecdotal accounts of discrimination" presented to a congressional task force. *See Garrett*, 531 U.S. at 370-71. Thus, it is unclear whether the examination includes all materials and testimony considered by Congress or is limited to the actual statutory text. *See id.* at 371 ("Congress' failure to mention States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented.").

This case presents an opportunity for this Court to clarify what role, if any, "legislative history" – such as committee reports, testimony of individuals, or floor statements – should have in determining whether or not Congress has identified a pattern of unconstitutional activity by the States. As explained below, the States believe that the examination should be limited to the actual statutory text. However, even if this Court considers legislative history, in this case, the fact remains that the record on Title II of the ADA is inadequate to support a finding of a history or pattern of constitutional violations by the States.

A. The Examination of Congressional Findings Should Be Limited to the Statutory Text.

A determination that Congress has found a pattern of constitutional violations by the States, sufficient to

support an abrogation of sovereign immunity, should be based on the actual statutory text, without reference to legislative history. The reason for this is simple – "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). Over a century and a half ago, this Court explained:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used. . . .

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).[3] Although this principle is applicable to all statutory interpretation, it is especially compelling when the Federal

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[3] As Justice Scalia noted in another context:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts Constitution: A government of laws, not men. Men may intend what they will; but it is only the laws that they enact which bind us.

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (1997).

legislature would act to alter the constitutional balance between the States and the National Government by abrogating sovereign immunity. Where Congress makes such an effort, a Court must assure itself that Congress was convinced that the States were engaged in a pattern of unconstitutional activity.

It is impossible for this Court to know if those who voted for a law were aware of particular testimony or the contents of a specific committee report. It is impossible to know what forces or considerations influenced their vote. It is only the text of the law that was approved that can be known with sufficient certainty. Thus, statutory text should be the sole touchstone for determining whether a majority of both Houses of Congress, and the President who signed the bill into law, were convinced that the States were acting with the requisite disregard for the Federal Constitution.

With regard to Congress' attempted abrogation in Title II of the ADA, if examination is limited to the statutory text, then it is clear that Congress has not made findings of a pattern of unconstitutional discrimination by the States. This is true for two reasons. First, nothing in the statutory text identifies particular unconstitutional discrimination by the States. *Wessell*, 306 F.3d at 211. *See also Garrett*, 531 U.S. at 369 ("[T]he great majority of these incidents [of discrimination against the disabled] do not deal with activities of the States."). Second, although Congress made findings of "discrimination" within the statutory text, 42 U.S.C. § 12101(a), it is not clear that Congress' use of the term "discrimination" meant arbitrary or irrational conduct that would violate the Constitution. *Wessell*, at 211; *Thompson*, 278 F.3d at 1033. Consequently, the statutory text of the ADA does not support a

conclusion that Congress found a history or pattern of constitutional violations by the States.

B. Even a Review of the Entire Legislative History Does Not Reveal a Congressional Finding that the States Engaged in a Pattern of Unconstitutional Activity.

Even if this Court concludes that it should look beyond the statutory text and consider legislative history, there is no finding of a pattern of constitutional violations by the States. Indeed, the Fourth Circuit recently noted:

> Neither can we find an adequate record to support abrogation in the official congressional reports concerning the ADA. The reports do contain several examples of unfavorable treatment of disabled people by public entities. Even assuming that these anecdotal reports clearly demonstrate unconstitutional discrimination, the discrimination did not occur at the hands of the state.

Wessell, 306 F.3d at 211 (citations omitted). Similarly, the Tenth Circuit has observed:

> There is some evidence in the congressional record that unconstitutional discrimination against the disabled exists in government "services, programs, or activities." However, most of these occurrences involve local officials and not the states. In any event, the vast majority of incidents discussed in the legislative record involving government "services, programs, or activities" are refusals by public entities to make accommodations for the disabled. The absence of numerous examples of unconstitutional discrimination against the disabled confirms the notion that Title II's primary focus was the failure by public

> entities to make accommodations for the disabled.

Thompson, 278 F.3d at 1033 (citations and footnotes omitted). *See also Rickenbacker v. Foster*, 274 F.3d 974, 982 (5th Cir. 2001) ("A closer look at the legislative history indicates that most of the examples of arguably unconstitutional governmental discrimination against the disabled involved local, not state, government."). In sum, a careful examination of legislative history indicates little or no evidence of a pattern of constitutional violations *by the States*.

C. There Is No Judicial Documentation of Constitutional Violations by the States.

Congress' failure to find a pattern of constitutional violations by the States is reinforced by the paucity of lawsuits against the States alleging unconstitutional disability discrimination in the years immediately prior to the enactment of the ADA. As Justice Kennedy, joined by Justice O'Connor, noted, if the States have engaged in unconstitutional conduct, "one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations." *Garrett*, 531 U.S. at 376 (Kennedy, J., joined by O'Connor, J., concurring). Yet, there is no such "judicial documentation" of unconstitutional discrimination by the States. *Id.*

There is simply no evidence of a pattern of unconstitutional activity by the States in the statutory text, the legislative history, or provided by the judicial record. Therefore, this Court can only conclude that there was no pattern of constitutional violations by the States to

support Congress' attempt to abrogate their sovereign immunity. Without such a finding, Congress' attempt to abrogate sovereign immunity for ADA Title II claims is invalid.

III. CONGRESS' ABROGATION OF THE SOVEREIGN IMMUNITY OF ALL STATES FOR ALL TIME IS A DISPROPORTIONATE RESPONSE TO CONSTITUTIONAL VIOLATIONS BY THE STATES.

As explained above, there is no pattern of unconstitutional activity by the States that justifies the abrogation of sovereign immunity for ADA Title II claims. Accordingly, it is unnecessary for this Court to reach the issue of whether the abrogation of sovereign immunity is, in fact, a proportionate response. *See College Sav. Bank v. Florida Prepaid Post Secondary Educ. Expense Fund*, 527 U.S. 666, 675 (1999). However, if the Court were to conclude that Congress identified a pattern of conduct sufficient to support abrogation, then it should also conclude that Congress' decision to abrogate the sovereign immunity of *all* States for *all time* is disproportionate to the constitutional violations. *See Florida Prepaid*, 527 U.S. at 646.

Congress' abrogation of sovereign immunity is disproportionate for two reasons. First, the abrogation applies to *all* States rather than simply those States shown to be engaged in unconstitutional discrimination. In other words, all States are punished for the sins of the few. Such a remedy is not proportionate. A proportionate remedy would limit abrogation to those States that Congress has actually found to be acting in violation of the Constitution. If a State has not violated the Constitution, it ought not be stripped of so fundamental an attribute of its sovereignty.

Second, the States' immunity is abrogated for all time rather than for some limited period of time. In other words, because a State violated the Constitution in the 1980's, it will have no sovereign immunity in the 2030's. Such a remedy is not likely to be proportionate to the constitutional violations that support it. A proportionate remedy would limit the abrogation in time, thus requiring reconsideration of its necessity, with the possibility that it might be renewed, if there were evidence that the State continued in its pattern of unconstitutional activity. If a State ceased its unconstitutional activity, its immunity could be restored.

The approach advocated by the States is best illustrated by the Voting Rights Act, 42 U.S.C. §§ 1971-1973o, which was passed pursuant to Congress' power to enforce the Fifteenth Amendment. *See Garrett*, 531 U.S. at 373 n.8 ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."). The Voting Rights Act does not apply to *all* States or even to *all* jurisdictions within a particular State. *See* 42 U.S.C. § 1973b(b). Rather, it applies only to those States, or jurisdictions within a State, which have been identified by Congress as having violated voting rights. *See id.* In other words, those States that have not been identified as acting in violation of the Constitution are not subject to its remedial terms. Moreover, the restrictions imposed by the Voting Rights Act are not of unlimited duration. The statute allows jurisdictions to seek removal from its coverage. *See* 42 U.S.C. § 1973k. Once the violations have been corrected, and there is no likelihood of further violations, the State's sovereignty over its elections may be restored.

In the context of Congress' abrogation of sovereign immunity, this Court should require that (1) the abrogation be limited to those States actually engaged in constitutional violations; and (2) the abrogation be of limited duration, with an opportunity for extension if the State continues to engage in constitutional violations.

CONCLUSION

For the reasons stated above, and in the Petitioner's Brief, the judgment of the U.S. Court of Appeals for the Ninth Circuit must be REVERSED.

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In The
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MEDICAL BOARD OF CALIFORNIA,

Petitioner,

vs.

MICHAEL J. HASON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does the Eleventh Amendment bar suit under Title II of the ADA against the California Medical Board for denial of a medical license based on the applicant's mental illness?

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OPINIONS BELOW

The initial decision of the United States Court of Appeals for the Ninth Circuit, dated February 12, 2002, concluded that Congress validly abrogated the State's Eleventh Amendment immunity in the Americans With Disabilities Act (ADA.) It is set forth at Pet. App. 1-13, and published at 279 F.3d 1167. The June 26, 2002 order denying a petition for rehearing en banc, with its dissenting opinion, appears in the Appendix at Pet. App. 26-36, and is published at 294 F.3d 1166. The judgment of the United States District Court for the Central District of California, filed April 27, 2002, is set forth in Appendix at Pet. App. 14, and the February 1, 2000 Report and Recommendation of the Magistrate Judge, adopted by the judgment, is set forth in the Appendix at Pet. App. 17-25.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, denying the Petition for rehearing en banc, was filed and entered on June 26, 2002, and is now final. This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one

> of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XI.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

Title II of the Americans With Disabilities Act of 1990 provides in pertinent part:

> The term "public entity" means –
>
> (A) any State or local government;
>
> (B) any department, agency, special purpose district, or other instrumentality of a State. . . .

42 U.S.C. § 12131.

> . . . . [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

> entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Title V of the Americans With Disabilities Act of 1990 provides in pertinent part:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202.

Title V, Section 514 also states that:

> Should any provision in this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

42 U.S.C. 12213.

STATEMENT

This case comes before the Court in a limited context, *viz.*, the decision by a state medical-licensing board to deny issuance of a license to practice medicine, on the ground of mental illness; no other deprivation of Title II

rights is in issue. Ignoring available state-court remedies for judicial review, Michael Hason, Respondent herein, sued the Medical Board of California for injunctive relief and damages in United States District Court, alleging that the denial of his license application violates the Americans with Disabilities Act (ADA). The Board's objection to the federal court proceeding on Eleventh Amendment grounds, based on this Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (*Garrett*), was sustained by the district court, but the dismissal of the action was later overruled by the Ninth Circuit.

1. The analysis in this case rests on well-trod constitutional ground exploring the relationship between the Eleventh Amendment and Section 5 of the Fourteenth Amendment, see *e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999), and is an inevitable sequel to *Garrett*. In that case this Court concluded that Congress' attempt to abrogate the Eleventh Amendment under Title I of the ADA exceeded its authority. The same result is compelled as to Title II, which prohibits disability discrimination by public entities in the issuance of professional and vocational licenses.[1]

[1] The Court declined to grant certiorari on the second question presented by the Board's petition: "Does Title II of the ADA limit the authority of the California Medical Board to deny an applicant licensure as a physician because of the applicant's mental illness?" Accordingly, the Board assumes, for purposes of the instant argument, that Title II does include within its regulatory scope the Board's authority to issue medical licenses. Nevertheless, the Court need not reach the constitutional question if it appears that the Ninth Circuit erred in its

(Continued on following page)

Petitioner Medical Board of California does not dispute the wisdom of the ADA, its laudable goals of eliminating societal discrimination on the basis of mental or physical disabilities, or that the ADA is "a milestone on the path to a more decent, tolerant, progressive society." *Garrett,* 531 U.S. at 375 (Kennedy, J., concurring). Nor does the Board dispute that the ADA is entirely proper legislation under the Commerce Clause. Rather, this case rests only on the issue of state sovereign immunity and its abrogation under the Fourteenth Amendment. The Court has made clear that only *appropriate* Congressional legislation enacted pursuant to Congress' authority under Section 5 of the Fourteenth Amendment will abrogate "[t]he ultimate guarantee of the Eleventh Amendment . . . that nonconsenting States may not be sued by private individuals in federal court." *Garrett,* 531 U.S. at 363, citing *Kimel v. Florida Bd. of Regents,* 528 U.S. at 73.

2. In 1995, Michael Hason applied to the California Medical Board for a license to become a physician in California.[2] In 1996, pursuant to the Board's mission to

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construction of Title II to encompass individual professional and vocational licensing decisions.

[2] The California Medical Board (the Board) is an agency within the California Department of Consumers Affairs charged with administering the provisions of California's Medical Practice Act. Cal. Bus. & Prof. Code § 2000, et seq. The Board consists of a Division of Licensing and a Division of Medical Quality. Cal. Bus. & Prof. Code § 2003. The Board's Division of Licensing is responsible for the issuance of medical licenses. Cal. Bus. & Prof. Code § 2005. The Division of Medical Quality is charged with disciplining licensed physicians who violate the Medical Practice Act. Cal. Bus. & Prof. Code § 2004. The Board's primary purpose is protection of the public and ensuring the safe practice of medicine in the State. Cal. Bus. & Prof. Code § 2229.

protect the public health and safety, the Board denied his application for a medical license on the basis of his history of untreated mental illness and multiple drug dependency. Pet. App. 38-39, 43-44 ¶ 1, 14-16. Hason sought administrative review of the Board's decision, and the denial was affirmed after hearing, effective March 1998. Pet. App. 38, 45, ¶¶ 1, 24. Hason did not seek state court review of the administrative decision, although such review was indeed available. *See* Cal. Govt. Code § 11523, Cal. Code Civ. Proc. § 1094.5. Nor did he file any action under California's extensive anti-discrimination statutes. See, *e.g.*, California's Fair Employment and Housing Act, Cal. Govt. Code § 12944, which prohibits state licensing boards from unlawful discrimination on a variety of bases, including the basis of a mental or physical disability. Instead, on April 21, 1999, respondent sued the Board in federal court, seeking twenty million dollars in damages (and twenty million in punitive damages) and alleging, in part, that the Board violated Title II of the ADA. Pet. App. 37-55.[3]

[3] In 2000, Hason filed a second application with the Board for a medical license. In 2001, he successfully passed the Board's psychiatric evaluation. Based solely on his second application, the parties stipulated that the Board would grant him a probationary medical license, with various terms and conditions. Though now licensed, Hason may not yet practice medicine until he passes a prescribed examination demonstrating his medical competence, a condition that is applied to all probationary licensees who have not practiced medicine for a substantial period. Despite these events, because Hason is prosecuting an action against the Board for *damages*, based on the Board's first denial of his application, this matter is not moot. Cf., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990).

The district court granted the Board's motion to dismiss Hason's action on grounds of sovereign immunity under the Eleventh Amendment. Pet. App. 14. The Ninth Circuit reversed. Pet. App. 3. Reasoning that this Court's opinion in *Garrett*, was not binding precedent because that opinion applied only to Title I of the ADA, the Ninth Circuit held that California's denial of a medical license to Hason stated a cause of action for discrimination under Title II of the ADA. Pet. App. 5-7. However, the Ninth Circuit also declined to apply the three-part analysis set forth in *Garrett*, concluding that the holding in this case would still be governed by the analysis found in two pre-*Garrett* Ninth Circuit opinions: *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997) and *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), both of which hold that the State is subject to suit under the ADA despite the Eleventh Amendment. Pet. App. 5-6, 10.[4]

Against this backdrop, Petitioner contends that by permitting damage suits to review individual professional licensing decisions by state agencies, Congress exceeded its grant of authority under section 5 of the Fourteenth Amendment.

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[4] The court also concluded that Title II of the ADA applies to licensing activities of the Medical Board, held that individuals could be sued in their official capacities for future injunctive relief under *Ex Parte Young*, and dismissed the individual defendants in their personal capacities. This Court declined to review the first of these conclusions. None of the other issues is before the Court in this proceeding.

SUMMARY OF ARGUMENT

Despite the undeniable importance of the question involved, very little in the way of new jurisprudence is presented by this case. The analysis to be applied to the question was laid out with clarity and certainty by this Court in *Garrett*. Under that analysis, the Court will inquire whether, in purporting to exercise its remedial and prophylactic authority under Section 5 of the Fourteenth Amendment, Congress has overstepped its powers. As this Court explained in *Garrett* and prior precedent, Congress may overstep its authority under Section 5 either by seeking effectively to elevate *constitutional* conduct to the status of *unconstitutional* conduct, in derogation of this Court's authority under Section 1 of the Fourteenth Amendment, or by stripping the States of their immunity under the Eleventh Amendment as a remedy that is out of all proportion to any evidence that unconstitutional conduct by the States calls for such a deprivation of the States' constitutional rights.

Just as the Court in *Garrett* chose to distinguish between Title I and Title II of the ADA for purposes of constitutional analysis, leaving consideration of Title II-issues for another day, 531 U.S. at 360 n.1, the Court is not required to treat Title II as a singularity in order to dispose of the dispute between the parties here. As construed by the Attorney General pursuant to Congressional directive, see 42 U.S.C. § 12134(a); 28 C.F.R. § 35.130, Title II can encompass a variety of qualitatively very different kinds of activities undertaken by state and local government, from constructing and remodeling buildings to providing telecommunication services to the public. The evidence underlying enactment of the ADA would not seem to support an inference that Congress saw a need to

remedy a pattern of invidious discrimination by States on the basis of disability in any activity encompassed by Title II, but the Court need not undertake such a broad inquiry in order to resolve this case. In light of the important public interests obviously intended to be furthered by Congress, the Court could properly use this case to provide overarching guidance in the context of state licensing activities, leaving it for the lower courts to assess the constitutional validity of abrogation under Title II in the context of the various other classes of governmental activities that are subsumed within the phrase "services, programs, or activities." 42 U.S.C. § 12132. See, *e.g.*, *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.")

Even under a focused approach to resolution of this dispute, the fundamental three-part analysis will be the same and is dictated by *Garrett*. Under this methodology, the Court will first define the "metes and bounds" of the constitutional right in question, see *Garrett*, 531 U.S. at 368, then proceed to determine whether, in purporting to exercise its authority under Section 5, Congress was responding to evidence of a pattern of historic unconstitutional discrimination by States against persons based on disability. *Ibid.* Finally, the Court will consider whether the burdens imposed on States are "congruent and proportional" to the evidence of unconstitutional discriminatory conduct by States. *Id.* at 372-74.

Applying the *Garrett* methodology in this case, it is evident that *Garrett* confirmed that the constitutional propriety of state discrimination based on disability is to

be measured by a "rational basis" test. 531 U.S. at 367-68. Congress could properly exercise its authority under Section 5 to abrogate Eleventh Amendment immunity, then, only to remedy or prevent *unconstitutional*, *i.e.*, irrational, discrimination by States on the basis of disability. It is not enough that there may be evidence that some facially neutral state actions may have the effect of discriminating against persons with disabilities; only invidious discrimination based on disability is unconstitutional.

But as was the case in *Garrett*, the legislative record underlying the ADA reveals no such pattern of unconstitutional discrimination by States, much less in the context of state licensing. Indeed, as the Court recognized in *Garrett*, to the extent that the legislative record expressly addresses actions by state governments, it tends to demonstrate a congressional awareness that States were ahead of Congress in enacting prophylactic and remedial legislation for persons with disabilities.

And, finally, as was the case in *Garrett*, the minimal, anecdotal evidence of discrimination by States based on disability – even if it were assumed that the evidence related to unconstitutional discrimination – is so limited in scope and severity as to provide no sufficient basis for the extraordinary remedy of abrogating the States' immunity under the Eleventh Amendment for purposes of challenging state licensing actions. Even in those limited instances of *invidious* discrimination, aggrieved individuals would have the ability to seek prospective injunctive relief against the offending officials pursuant to *Ex parte Young*, 209 U.S. 123 (1908). Indeed, the remedy of abrogation is as disproportionate to the scope of the assumed evil to be remedied, as the burdens imposed on States are "incongruent" with an effort to remedy that assumed evil.

Just as the Court found to be the case with respect to Title I of the ADA, Title II imposes a higher level of scrutiny of justifications for failure to make accommodation for disability in licensing procedures and requirements than the "rational basis" standard required by the Constitution itself.

Nothing in this case justifies departure from the Court's analysis and conclusion in *Garrett*. The decision of the Ninth Circuit should be reversed.

ARGUMENT

BASED ON THIS COURT'S RECENT DECISION IN *GARRETT*, THE CONCLUSION IS INESCAPABLE THAT CONGRESS EXCEEDED ITS FOURTEENTH AMENDMENT POWERS BY ABROGATING ELEVENTH AMENDMENT IMMUNITY FOR CHALLENGES TO STATE PROFESSIONAL AND VOCATIONAL LICENSING DECISIONS

A. The Court's *Garrett* opinion set forth the three-part test for assessing whether Congress acted unconstitutionally in abrogating Eleventh Amendment immunity from federal-court suits alleging unlawful discrimination based on disability under the ADA.

Two years ago, this Court in *Garrett* held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment by abrogating state sovereign immunity with respect to alleged violations of Title I of the ADA. The Court declined to reach the question whether Title II of the same statutory scheme is appropriate legislation under Section 5. *Garrett*, 531 U.S. 360 n. 1.

In reaching its conclusion with respect to Title I, the Court engaged in a three-step inquiry predicated on the language of the Fourteenth Amendment itself. Drawing upon its earlier analysis in *City of Boerne v. Flores,* 521 U.S. 507 (1997), the Court reaffirmed that, under Section 5 of the Fourteenth Amendment, Congress' power is limited to remedy and prevention of violations of the rights guaranteed by Section 1, and that it is the province of the Court to define the substance of those Section 1 guarantees. *Garrett*, 531 U.S. at 365. Under the Court's reasoning, the three-part test serves to ensure that the operative effect of congressional abrogation under Title I is not transformation of *statutory* rights into ersatz *constitutional* rights not otherwise protected by Section 1.

Applying the three-part methodology, the Court first identified the scope of the Section 1 constitutional right as the right to be free from a failure by States, without a rational basis, to make special accommodation for disabilities in employment decisions. 531 U.S. at 365-68. Next the Court inquired whether Congress' decision to exercise its authority under Section 5 was grounded in evidence of a pattern of unconstitutional discrimination by the States against persons with disabilities, *id.* at 368-72, concluding that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational *state* discrimination." *Id.* at 368 (emphasis added). Nevertheless, assuming the existence of some evidence of unconstitutional state discrimination as might justify exercise of remedial authority under Section 5, the Court proceeded to apply the "congruence and proportionality" test articulated in *City of Boerne. Id.* at 372-74. That is to say, the Court considered whether the remedy provided

under Title I is "congruent" with the elimination of identified unconstitutional discrimination by States, cf. *City of Boerne*, 521 U.S. at 530, and whether, in light of the evidence, the remedy of abrogation of sovereign immunity is a "proportional" response to the targeted violation by States. See *id.* at 531. Distinguishing the paucity of evidence of invidious state discrimination in employment of disabled persons from the overwhelming evidence of historic and pervasive state discrimination against minorities that underlay enactment of the sweeping Voting Rights Act, *id.* at 373, citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court concluded that even the evidence of unconstitutional state discrimination arguably explaining application of Title I to States could not justify abrogation of sovereign immunity otherwise guaranteed to the States by the Eleventh Amendment. The Court noted specially that Title I imposes on States a burden of justifying their failure to make special accommodation for disability that is greater than the burden demanded by Section 1 of the Fourteenth Amendment itself. *Garrett*, 531 U.S. at 327-73.

Nothing in the instant case justifies a departure from the three-step analysis applied by the Court in *Garrett*. The question presented here is whether Congress exceeded its Section 5 powers by abrogating Eleventh Amendment immunity for alleged failure by a State to make accommodation for disability in the issuance of professional and vocational licenses.

B. The Court may properly resolve this dispute by holding that Congress exceeded its Fourteenth Amendment powers with respect to the specific activity at issue – professional and vocational licensing – rather than considering Title II of the ADA *in toto*.

To resolve the dispute between the parties before the Court, it is not necessary for the Court to decide whether congressional abrogation of sovereign immunity under Title II is unconstitutional with respect to every type of state activity that may be subject to that Title; the Court need only consider the question whether Congress properly acted within its Section 5 powers by abrogating state sovereign immunity in respect to challenges to state professional and vocational licensing. Unlike Title I, which addresses the single activity of employment, Title II encompasses an array of qualitatively different governmental activities within the broad phrase, "services, programs, or activities." 42 U.S.C. § 12132. These can include, especially in light of the Attorney General's implementing regulations, construction and remodeling of public buildings, modifications of streets and highways, appointments to advisory and planning boards, contracting, licensing, and participation in services of every kind. See 28 C.F.R. § 35.130 ("General prohibitions against discrimination"). It might be argued that the very reasons why Congress exceeded its Section 5 powers with respect to licensing lead to the conclusion that Congress exceeded its Section 5 powers in enacting Title II in its entirety. But the Court need not go that far in resolving this case.

As demonstrated in Section (C), *infra*, the legislative record as reviewed by the Court in *Garrett* presented no evident examples of unconstitutional discrimination by

States against the disabled in the issuance of professional or vocational licenses. Nor are there sufficient examples of unconstitutional state discrimination against the disabled, generally, to justify Title II's regulation of state licensing as a prophylactic measure. This does not mean, however, that the same result will obtain with respect to *every* activity covered by Title II. For example, the burdens imposed by the Attorney General's implementing regulations are not identical for every service, program, or activity, but in some instances are tailored to the specific governmental activity. See, *e.g.*, 28 C.F.R. § 35.130 (general prohibitions); 28 C.F.R. § 35.150 (regarding accessibility to existing facilities).

This Court's precedents support an approach that considers Congress' authority in the context of a specific state activity that is alleged to be discriminatory on the basis of disability. Indeed, in *Garrett* itself, the Court declined to treat the ADA as a totality for purposes of the constitutional analysis. See 531 U.S. at 360 n.1. Such a narrower approach furthers the doctrine of constitutional avoidance. As this Court has stated, "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944); see also "*Ashwander v. T.V.A.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). The ADA is "a milestone on the path to a more decent, tolerant, progressive society." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). A prudent regard for principles of separation of powers would certainly justify a focused approach to the question whether Congress could validly abrogate state

sovereign immunity for failure to make special accommodation for disability, considering the context in which the state's action is taken.

In *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698, 703-05 (4th Cir. 1999) (Wilkinson, J.), the Fourth Circuit followed the approach suggested herein. The court of appeals found invalid Congress' effort to abrogate the States' immunity from suits that alleged a violation of the Title II regulation prohibiting public entities from charging a fee to cover costs of accessibility programs designed to assist the disabled. Based in large measure on the doctrine of constitutional avoidance, and over the United States' objection, the Court did not review the constitutionality of Title II's abrogation provision *in toto*. *Id*. The Ninth Circuit has expressly disagreed with that approach. See *Dare*, 191 F.3d at 1173 n.2. The Board submits that the Fourth Circuit's approach is more consistent with this Court's jurisprudence.

C. This Court's review of the legislative record in *Garrett* compels the conclusion that Congress' abrogation of Eleventh Amendment immunity for federal-court damage actions was not based on evidence of any need for congressional action to remedy an historic pattern of unconstitutional discrimination by States in the issuance of professional and vocational licenses on the basis of disability.

The first prong of the test applied in *Garrett* – defining the "metes and bounds of the constitutional right in question" – was concluded by the Court in *Garrett* itself. There, the Court held that States "are not required by the Fourteenth Amendment to make special accommodations

for persons with disability so long as the state actions toward such individuals are rational." *Garrett*, 351 U.S. at 368. "If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 369. We can, therefore, turn quickly to the second prong of the test, *viz.*, ascertaining whether, in purporting to act under Section 5 of the Fourteenth Amendment, Congress had identified a history and pattern of unconstitutional licensing discrimination by States against persons with disability.[5] Petitioner submits that the conclusion of that examination in this case yields the same result as in *Garrett*.

The Court made clear in *Garrett* that what is required to satisfy this prong of the analysis is evidence of invidious, *i.e.*, purposeful, discrimination by States. See *Garrett*, 531 U.S. at 372-73, quoting *Washington v. Davis*, 426 U.S. 229, 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate

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[5] The Board does not deny Congress' *intent* to abrogate Eleventh Amendment State immunity through 42 U.S.C. § 12202. The only explanation in the ADA legislative history for the abrogation provision is the statement that it was "included in order to comply with the standards for covering states set forth in Atascadero State Hospital v. Scanlon, [473 U.S. 234] 105 S.Ct. (1985)." 1 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act, 100th Cong., 2d Sess. 1040 (Comm. Print 1990) [hereafter "Leg. Hist."] 184. In *Atascadero*, this Court interpreted section 504 of the Rehabilitation Act and emphasized that only unequivocal statutory language could abrogate the Eleventh Amendment immunity of States. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985).

impact." (emphasis in original)). As a threshold matter, one would not expect to find evidence of invidious state discrimination in licensing on the basis of disability, when – as found in *Garrett* – there is no evidence that the States are engaging in invidious discrimination in employment of persons with disability. The two matters are interrelated, for licensing is part of the process by which individuals may obtain certain types of employment. And, indeed, as the Court concluded in *Garrett* nothing in the legislative record underlying enactment of the ADA shows evidence of invidious discrimination by States against persons with disabilities in *any* activity undertaken by States, much less in the issuance of professional and vocational licenses.

Moreover, licensing proceedings involve the possibility of unconstitutional deprivation of property rights or liberty interests, and are therefore inherently infused with significant due process protections that include judicial review of allegedly discriminatory decisions within the state-court system and, to the extent an unconstitutional deprivation is alleged, potentially in this Court. Accordingly, evidence of a pattern of invidious discrimination in licensing programs would mean that there had been a pervasive breakdown in state judicial processes invoked to review allegedly arbitrary license denials based on disability. Nothing in the legislative record suggests such a breakdown.

1. The congressional findings do not reflect particular congressional concern about a pattern of historic invidious state discrimination in licensing on the basis of disability.

The ADA contains a series of "Findings" explaining why it was enacted by Congress. 42 U.S.C. § 12101.

Those Findings express Congress' concern with discrimination based on disability in the myriad facets of American society. Thus, paragraph (a)(2) finds that, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[6] Paragraph (a)(3) finds that, "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." Paragraph (a)(5) finds that individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities. The Findings also identify several aspirational goals regarding treatment of persons with

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[6] The Findings relate disability with age, noting that some 43 million Americans "have one or more physical or mental disabilities," the number of which "is increasing as the population as a whole is growing older," *id.* at (a)(1); the Findings note that "census data, national polls, and other studies have documented that people with disabilities ... are severely disadvantaged socially, vocationally, economically, and educationally," *id.* at (a)(6); and the Findings observe that "unfair and unnecessary discrimination ... costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* at (a)(9).

disabilities – among them "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency," 42 U.S.C. § 12101(a)(8), and to provide "legal recourse" that they often have not had, *id.* at (a)(4).

Conceding that the Findings correctly state that persons with disabilities have long been subjected to "discrimination," the Findings do not remotely establish the necessary predicate for Section 5 legislation. Specifically, they do not suggest that this discrimination is all, or even in large part, attributable to unconstitutionally discriminatory actions by state government, much less discriminatory licensing decisions by States that have no rational basis. Cf., *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) ("It is a question of quite a different order . . . to say that the States in their official capacities, as governmental entities, must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens.")

The sweeping and general language of the Findings reflects Congress' intent to address, not only *invidious* discrimination, but also "effects" discrimination that would not be unconstitutional even if the result of action by a State. See 42 U.S.C. § 12101(a)(5); cf. *Alexander v. Choate*, 469 U.S. 287, 296-97 (1985) (discussing the intended reach of the Rehabilitation Act). However, as the Court confirmed in *Garrett*, Congress' authority under Section 5 is limited to remedy or prevention of *unconstitutional* conduct.

2. The legislative record underlying enactment of the ADA does not reveal evidence of a history and pattern of unconstitutional discrimination by the States

Eliminating discrimination on the basis of a person's mental or physical disability is an important social policy. But, it is "a most serious charge to say a State has engaged in a pattern and practice *designed* to deny its citizens the equal protection of the laws. . . . " *Garrett,* 531 U.S. at 375 (Kennedy, J., concurring) (Emphasis added.) The Court explained in *Garrett* that, to satisfy the test of justifying abrogation of state sovereign immunity, the legislative record must show that Congress had reason to be believe that States have been involved in a pattern of *unconstitutional* discrimination. But a review of the legislative record for evidence of such unconstitutional discrimination by States is no more helpful to Respondent than are the Findings supporting the ADA.

a. The "Task Force Report" reveals no pattern of unconstitutional discrimination by States

As noted in *Garrett*, Congress, as a prelude to enacting the ADA, created a special Task Force to assess the need for comprehensive legislation. *See Garrett*, at 370-71, and at 377-78 [Breyer, J., dissenting]. This "Task Force on the Rights and Empowerment of Americans with Disabilities," was given the mission "to gather evidence of discrimination on the basis of disability in America." 2 Leg. Hist. 1035. The Task Force held hearings in every state and received over 6,500 letters from Americans in 40 states, sharing the "pain and frustration they experience in trying to live a life of dignity." *Id.* Those documents

were mostly handwritten letters and commentary collected during the Task Force's forums. See *id.* at 1336, 1389.

Appendix C to Justice Breyer's dissent in *Garrett* is a compilation of examples of discrimination gathered by this Task Force. See *Garrett,* at 378-383 (Breyer, J., dissenting). The Court has already considered this evidence and found it lacking:

> Appendix C consists not of legislative findings, but of unexamined, anecdotal accounts of "adverse, disparate treatment by state officials." .... Of course, as we have already explained, "adverse, disparate treatment" often does not amount to a constitutional violation where rational-basis scrutiny applies. These accounts, moreover, were submitted not directly to Congress but to the Task Force on the Rights and Empowerment of Americans with Disabilities, which made no findings on the subject of state discrimination in employment. [footnote and citation omitted]. And, had Congress truly understood this information as reflecting a pattern of unconstitutional behavior *by the States*, one would expect some mention of that conclusion in the Act's legislative findings. There is none. See 42 U.S.C. § 12101.... Thus, not only is the inference Justice Breyer draws unwarranted, but there is also strong evidence that Congress' failure to mention *States* in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented.

Id., at 372.

The Task Force Report findings are, therefore, no more helpful to Respondent in this case than they were to

the respondent in *Garrett*. True, the majority of anecdotal items listed in the *Garrett* Appendix C fall within the subject matter of Title II, rather than Title I. However, a large percentage of these anecdotes appear to involve programs and services of *local government,* not the *States*. Or the anecdotes are too ambiguous to ascertain what level of government is involved.[7] What functions are those of the "State" as opposed to "local government" is generally a matter of state law, and requires careful analysis of the law of the State involved. Cf., *McMillian v. Monroe County*, 520 U.S. 781 (1997) (whether official represents the State when acting in a particular capacity is "dependent on an analysis of state law.") The Court noted in *Garrett* that "[i]t would make no sense to consider constitutional violations on [the part of local government] as well as by the States themselves, when only the States are

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[7] This is apparent even from a cursory review of just the 42 listings for California. For example, 14 of the entries (numbered 181, 211, 212, 221, 222, 223, 240, 241, 244, 247, 248, 250, 252, and 253) deal with public transportation. However, in California public transportation is generally the responsibility of transit districts, which are creations of state law but which are not agencies of the State itself and therefore are not entitled to sovereign immunity under the Eleventh Amendment. See *Logan v. Southern California Rapid Transit District*, 136 Cal.App.3d 117, 125 (1982), citing *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 280 (1977). Of the remaining entries, many clearly deal with other municipal functions, *e.g.*, entries numbered 166 (inaccessible public recreation sites); 206 (inaccessible county buildings); 223 (inaccessible airport; inaccessible public transportation); 232 (person denied opportunity to serve on jury because county failed to provide interpretive services for deaf people); 246 (inaccessible restrooms in county administration building; lack of curb cuts); and 254 (inaccessible county courthouse; street signals too fast for safe crossing by wheelchair).

the beneficiaries of the Eleventh Amendment." *Garrett*, 531 U.S. at 369.

The whole of Appendix C lists only nine references arguably relating to denials of a professional or vocational license. *Id.* at 398-420 (Appendix C, Nos. 261, 479, 732, 808, 1476, 1503, 1542, 1543, 1549.) None of these listings evinces unconstitutional discrimination by States, much less a pattern of such unconstitutional discrimination.

The anecdotal record reflected in Appendix C cannot reasonably be characterized as evidence of pervasive invidious state discrimination in licensing – or, indeed, in any other state activity – such as had "become a problem of national import." Cf. *Florida Prepaid,* 527 U.S. at 641 (1999).

b. Congress was aware that States had already enacted legislation to prohibit discrimination on the basis of disability.

Not only is the legislative record devoid of evidence of a pattern of invidious discrimination by States on the basis of disability, but as the Court in *Garrett* recognized, Congress was aware that, in many cases, the States were ahead of the Federal Government in protecting the rights of persons with disabilities.

> [B]y the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that "this is probably one of the few

> times where the States are so far out in front of the Federal Government, it's not funny."

Garrett, at 368, n.5, citing Hearing on Discrimination Against Cancer Victims and the Handicapped before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 100th Cong., 1st Sess., 5 (1987). Indeed, during Congressional hearings on the ADA, legislators and witnesses alike repeatedly noted that most States already had their own laws intended to prevent discrimination on the basis of disability. See *e.g.*, Hearing Before the House Subcommittee on Select Education, 101 Cong. 8 (Aug. 28, 1989) (Rep. Bartlett); Hearing Before the House Subcommittee on Employment Opportunities, 100 Cong. 86 (June 17, 1987) (Barbara Hoffman, Esq., Coalition for Cancer Survivorship); *Id.*, 101 Cong. 1 (Sept. 13, 1989) (Rep. Martinez); S. Rep. No. 101-116, at 84 and 92 (1989); 101 Cong. 7 (June 17, 1989) (Rep. Biaggi).

California, for example, has a long history of taking affirmative steps to end discrimination on the basis of a person's disability. Starting in 1968 – twenty years before enactment of the ADA – the Unruh Civil Rights Act began protecting the rights of persons with disabilities in California. See Cal. Civ. Code §§ 50, *et seq.*, §§ 54-55.1. California also provides additional protections and remedies to persons with disabilities under its Fair Employment and Housing Act, Cal. Govt. Code §§ 12900, *et seq*. See *e.g.*, §§ 12944 and 12948. Enacted eight years before the ADA, California's Government Code § 12944 specifically prohibits unlawful discrimination on the basis of a disability by state licensing Boards, and has other requirements to protect the rights of persons with disabilities. In addition California's Government Code §§ 4450-4459 requires provision of accessible facilities when constructed with

state or local agency funds. Furthermore, California's Medical Practice Act, under which Petitioner is governed, contains specific provisions for addressing licentiates with mental or physical illnesses. See Cal. Bus. & Prof. Code §§ 480, 822, 2221.

D. As was the case in *Garrett*, even if the legislative record could be said to disclose sufficient evidence of a pattern of unconstitutional state discrimination to justify preventive action under Section 5, the record would still not justify the incongruent and disproportionate remedy of abrogation of Eleventh Amendment immunity.

The Court has recently emphasized that "prophylactic legislation under § 5 must have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *United States v. Morrison*, 529 U.S. 598, 625-26, citing *Florida Prepaid*, 527 U.S. at 639. The Court's analysis in *Garrett* leads inexorably to the conclusion that Title II's abrogation of sovereign immunity is neither proportionate nor congruent to the ends sought to be achieved.[8]

[8] Of course, the United States retains the power to sue States for alleged violation of Title II, and injunctive relief is available against non-complying state officials under *Ex parte Young*, 209 U.S. 123 (1908).

1. As was true in *Garrett* with respect to Title I, the remedy of abrogation under Title II is disproportionate to the limited anecdotal evidence of state discrimination.

The Court noted in *Garrett* that the evidence of unconstitutional discrimination by States based on disability, such as it was, could not fairly be compared to the record of historic and pervasive discrimination by States against racial minorities that supported enactment of the Voting Rights Act. *Garrett,* 351 U.S. at 373. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court noted that Congress developed a formula under which the Voting Rights Act restrictions would apply only in locations where indicia of discrimination, such as literacy tests and low voter registration, were present. The most sweeping provisions would apply only to locations that had the greatest likelihood of a prevalent practice of racial discrimination. *Id.* at 330-32. Individual States were brought under coverage, not by Congressional fiat, but rather by "appropriate administrative determination which have not been challenged in this proceeding" *Id.* at 318. Congress also created a termination procedure whereby the Voting Rights Act's restrictions could be lifted if a State complied with the Act. *Id.* at 331-33; see also, *City of Rome v. United States,* 446 U.S. 156, 177 (1980) (upholding federal Voting Rights Act directives on States in narrowly tailored instances.) In sum, Congress' response to the shameful legacy of racial discrimination in voter registration was dramatic yet restrained, "a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified." *Garrett*, at 373. In contrast, as was the case with Title I, Congress' abrogation of the

Eleventh Amendment under Title II is not similarly restrained.

Title II is not as limited in application as was the Voting Rights Act. It applies to all States, irrespective of their own anti-discrimination laws and history, and provides for no termination of "coverage" upon sufficient demonstration of compliance.[9] As this Court has made clear: "This is not to say . . . that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates." *City of Boerne,* 521 U.S. at 533. But "[w]here a congressional enactment pervasively prohibits *constitutional* state action in an effort to remedy or to prevent *unconstitutional* state action, limitations of this kind tend to ensure Congress' means are proportionate to the ends legitimate under § 5." *Ibid.*

This Court in *Garrett* concluded that the limited evidence (at best) of invidious discrimination by States on the basis of disability could not justify invasion of the immunity guaranteed to the States by the Eleventh Amendment. Cf., *Kimel,* 528 U.S. at 86; *Florida Prepaid,* 527 U.S. at 647; *United States v. Morrison,* 529 U.S. 598, 627 (2000.) No different conclusion is reasonably possible in this case.

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[9] Indeed, as the Board noted earlier, California's own statutory prohibition against discrimination in licensure on the basis of disability *antedated* the ADA by eight years. See Cal. Govt. Code § 12944; Cal. Stats. 1980, ch. 992, § 4.

2. As was true in *Garrett* with respect to Title I, the remedy under Title II is not congruent with an intended effort to end unconstitutional discrimination in professional and vocational licensing by States.

In *Garrett*, the Court concluded that the requirements of Title I had the effect of imposing a greater burden on States to justify a failure to make special accommodation for disability, than is required by the Fourteenth Amendment:

> For example, whereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to 'make existing facilities used by employees readily accessible to and usable by individuals with disabilities.' 42 U.S.C. §§ 12112(5)(B), 12111(9). The ADA does except employers from the "reasonable accommodation" requirement where the employer 'can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.' § 2112(b)(5)(A). However, even with this exception, the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer. The Act also makes it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision . . . The ADA also forbids "utilizing standards, criteria, or methods of administration" that disparately impact the disabled, without

> regard to whether such conduct has a rational basis. § 12112(b)(3)(A).

Garrett, 531 U.S. at 372-73.

The same is true with respect to the requirements of Title II. The Attorney General's implementing regulations provide that "[a] public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. . . . " 28 C.F.R. § 35.130(a)(6). States are required to accommodate applicants with disabilities unless the State can show that the special accommodation "would fundamentally alter the nature of the service, program, or activity." *Id.* at (a)(7). However, the *Constitution* would permit a State to decline to make special accommodation, so long as the decision has a rational basis. *Garrett*, 531 U.S. at 367. In the case of the Medical Board, that rational basis is most commonly effectuation of its charge to protect public health and safety. See Cal. Bus. & Prof. Code § 2220.

Congress' power under Section 5 does not permit Congress to impose a greater level of scrutiny for state justification of failure to make special accommodation in professional and vocational licensing than is required by the Constitution itself. As the Court concluded in *Garrett*, "to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*." *Garrett*, 531 U.S. at 374.

CONCLUSION

For the reasons stated above, the Ninth Circuit's decision should be reversed, and the District Court's judgment reinstated.

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No. 02-479

In the Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA, PETITIONER

v.

MICHAEL J. HASON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Eleventh Amendment bars suit under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131-12165, against the California Medical Board for denial of a medical license based on the applicant's mental illness.

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Atkin v. *Kansas*, 191 U.S. 207 (1903) 13
Belanger v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993) 23

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Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 19
Board of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) ..... *passim*
Brown v. *Board of Educ.*, 347 U.S. 483 (1954) 22
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City of Boerne v. *Flores*, 521 U.S. 507 (1997) ..... *passim*
City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 15, 18, 20, 21, 37, 41
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 6, 8
City of Rome v. *United States.*, 466 U.S. 156 (1980) 7, 8
Clark v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998) 4
Clark v. *Jeter*, 486 U.S. 456 (1988) 37
College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) 10
Dare v. *California*, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001) 4
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Heumann v *Board of Educ.*, 320 F. Supp. 623 (S.D.N.Y. 1970) 32

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Lane v. *Tennessee*, 315 F.3d 680 (6th Cir. 2003) 27
Lawrence County v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) 13
Little v. *Streater*, 452 U.S. 1 (1981) 44
Memorial Hosp. v. *Maricopa County*, 415 U.S. 250 (1974) 44
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Reynolds v. *Sims*, 377 U.S. 533 (1964) 25
Rhodes v. *Chapman*, 452 U.S. 337 (1981) 33
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Miscellaneous:

Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Apr. 1989) 39
Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped and the Senate Comm. on Labor & Human Res., 101st Cong., 1st Sess. (1989) 26, 28, 34, 39, 40

Miscellaneous—Continued: Page

M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855 (1975) 19, 20
California Att'y Gen., *Commission on Disability: Final Report* (Dec. 1989) 23, 28, 29, 30, 39
Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 31
Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 31
Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 31
132 Cong. Rec. 10589 (1986) 30
134 Cong. Rec. 9384-9385 (1988) 38
136 Cong. Rec. (1990):
p. 10913 22
p. 11455 38
p. 11461 38
T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393 (1991) 20
Department of Health & Human Servs., *Visions of Independence, Productivity, Integration for People with Developmental Disabilities* (1990) 39
Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare, 93d Cong., 1st Sess. (1973):
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Employment Discrimination Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunity of the House Comm. on Educ. & Labor, 99th Cong., 1st Sess. (1985) 40

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Enforcing the ADA: A Status Report from the Department of Justice <http://www.usdoj.gov/crt/ada>:
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Oct.-Dec. 2001 35
Enforcing the ADA: Looking Back on a Decade of Progress (July 2000) 35-36
Equal Access to Voting for Elderly & Disabled Persons: Hearing Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. (1984) 25, 26
FEC, *Polling Place Accessibility in the 1998 General Election* (1989) 26
J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 261 (1986) 39, 40
GAO, *Briefing Report on Cost of Accommodations, Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. (1990) 44
H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965) 14
H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990):
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The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream (1986) 18
The ICD Survey II: Employing Disabled Americans (1987) 18
Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. (2001) 25
B. Hoffman, *Employment Discrimination Based on Cancer History*, 59 Temp. L.Q. 1 (1986) 39, 40

Miscellaneous—Continued: Page

Governor J. Kitzhaber, *Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization* (Dec. 2, 2002) 21
National Council on the Handicapped:
On the Threshold of Independence (1988) 16, 17
Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disablities (1986) 16
National Public Radio, *Look Back at Oregon's History of Sterilizing Residents of State Institutions* (Dec. 2, 2002) 21
New Mexico, *Official 2002 General Election Results by Office* (Dec. 2002) 21
Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979) 19
P. Reilly, *The Surgical Solution* (1991) 21
Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988) 18
S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3 (1965) 14, 15
S. Rep. No. 415, 92d Cong., 1st Sess. (1971) 40
S. Rep. No. 116, 101st Cong., 1st Sess. (1989) ..... *passim*
J. Shapiro, *No Pity* (1994) 24, 30
Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* (Comm. Print 1990):
Vol. 2 ..... *passim*
Vol. 3 ..... *passim*
Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* (1990) 17, 18, 29, 44
United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983) ..... *passim*
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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-13) is reported at 279 F.3d 1167. The opinion of the district court (Pet. App. 15-16) and recommendation of the magistrate judge (Pet. App. 17-25) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 12, 2002. A petition for rehearing en banc was denied on June 26, 2002 (Pet. App. 26-36). The petition for a writ of certiorari was filed on September 23, 2002, and was granted, limited to Question 1, on November 18, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Framework*: The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segre-

> gation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). As a result, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the Disabilities Act. 42 U.S.C. 12101(b)(4). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case involves a suit filed under Title II. That Title provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its

components. 42 U.S.C. 12131(1)(A) and (B). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[1]

The discrimination prohibited by Title II of the Disabilities Act includes, among other things, denying a government benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii). In addition, a public entity must make reasonable modifications in policies, practices, or procedures if the accommodation is necessary to avoid the exclusion of individuals with disabilities and can be accomplished without imposing an undue financial or administrative burden on the government, or fundamentally altering the nature of the service. See 28 C.F.R. 35.130(b)(7). The Disabilities Act does not normally require a public entity to make its existing physical facilities accessible. Public entities need only ensure that "each service, program or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless to do so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a). However, facilities altered or constructed after the effective date of the Act must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151.

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[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on prior regulations promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

2. *Factual and Procedural Background*: In early 1995, respondent Hason applied to petitioner for a license to practice medicine in California. Petitioner rejected Hason's application for reasons of mental illness. Pet. App. 3. Hason filed a pro se complaint in federal court in which he alleged that the denial of the license on the basis of mental illness violated, *inter alia*, Title II of the Disabilities Act. *Id.* at 3-4. The complaint named petitioner, the California Department of Consumer Affairs, the State of California, and twenty state officials, in their official and individual capacities, as defendants, and sought both damages and injunctive relief. *Id.* at 4, 26-27, 54-55. The district court dismissed Hason's complaint with prejudice. *Id.* at 14-15.

The court of appeals reversed. Pet. App. 1-13. As relevant here, adhering to circuit precedent, the court held that the abrogation of Eleventh Amendment immunity for Title II of the Disabilities Act was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. *Id.* at 5-6 (citing *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001), and *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998)).

Only one of those state defendants, the Medical Board of California, petitioned this Court for a writ of certiorari. This Court granted the petition, limited to the Eleventh Amendment question, and simultaneously granted the United States' motion to intervene, pursuant to 28 U.S.C. 2403, to defend the constitutionality of Title II's abrogation of immunity.[2]

[2] The United States takes no position on the merits of Hason's claims.

SUMMARY OF ARGUMENT

Application of Title II of the Americans with Disabilities Act to States and their subdivisions falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. In enacting Title II, Congress focused its legislative attention on the specific problem of discriminatory access to state and local government services; it did not simply extend a policy focused on the private sector to the government. After decades of legislative experience in the field, years of hearings and study, countless submissions and testimonials by citizens across the Nation, and thoroughgoing congressional review, Congress determined that persons with disabilities had suffered from a virulent history of official governmental discrimination, isolation, and segregation. Congress found, moreover, that such discrimination and segregation, like race and gender discrimination, had repercussions that have persisted over the years and that continued to be manifested in decisionmaking by state and local government officials across the span of governmental operations. That official discrimination results not just in the denial of the equal protection of the laws and equal access to governmental benefits, but also in the deprivation of fundamental rights, such as voting, access to the courts, substantive and procedural due process, the ability to petition government officials, and Fourth and Eighth Amendment protections.

In Title II, Congress formulated a statute that, much like federal laws combating racial and gender discrimination, is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, the Disabilities Act preserves the latitude and flexibility States legitimately

require in the administration of their programs and services. The Disabilities Act accomplishes those objectives by requiring States to afford persons with disabilities genuinely equal access to services and programs, while at the same time confining the statute's protections to "qualified individual[s]," who by definition meet all of the States' legitimate and essential eligibility requirements. The Act simply requires "reasonable" modifications for individuals with disabilities that do not impose an undue burden and do not fundamentally alter the nature or character of the governmental program. The statute is thus carefully tailored to prohibit only state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of the prior unconstitutional isolation and broad denial of rights of persons with disabilities.

ARGUMENT

BECAUSE IT COMBATS AN ENDURING PROBLEM OF UNCONSTITUTIONAL MISTREATMENT AND DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES, TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS VALID SECTION 5 LEGISLATION

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to Congress, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001); see also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation & emphasis omitted). Section 5 thus "gives Congress broad power in-

deed," *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999) (citation omitted), including the power to abrogate the States' Eleventh Amendment immunity, *Garrett*, 531 U.S. at 364.

Although Section 5 empowers Congress to enact prophylactic and remedial legislation to enforce Fourteenth Amendment rights, it also requires a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). Title II of the Disabilities Act is appropriate Section 5 legislation because it responds to a history of pervasive discrimination and deprivation of constitutional rights by States, which has spawned continuing discrimination and the denial of rights in the daily decisions of officials, and because the legislation is reasonably designed to prevent and remedy those constitutional violations.

Petitioner suggests that this Court (Br. 14-16) should focus not on Title II's overall propriety as Section 5 legislation, but instead should independently analyze whether Congress's inclusion of licensing—even more narrowly, "professional and vocational" licensing (*id.* at 14)—in Title II was appropriate. While Congress's inclusion of licensing is supported by the legislative record (see Section B(2)(b)(ix), *infra*), petitioner's proposed mode of analysis is fundamentally flawed.

First, Petitioner's context-specific approach is unprecedented. In the past, this Court has analyzed whether Congress has the authority to apply to the States a statute as a whole, *Flores*, *supra*, a specific Title of a statute, *Garrett*, *supra*, or a specific Section of a statute, *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). But in no case has this Court required Congress to justify the application of an intentionally comprehensive statutory provision to every potential context. In fact, the Court took a different tack in *City of Rome* v. *United States*, 446 U.S. 156 (1980), in upholding the application of voting preclearance requirements

to cities where no discriminatory purpose underlay their adoption of an electoral system, *id.* at 172, even if the city "has been innocent of any wrongdoing for the last 17 years," *id.* at 190 (Stevens, J., concurring); see also *Gaston County* v. *United States*, 395 U.S. 285 (1969).

Second, petitioner's approach is at odds with this Court's congruence and proportionality test for evaluating Section 5 legislation. Congruence and proportionality analysis necessarily entails looking at a statutory provision's operation and coverage as a whole, and measuring it against the predicate for congressional action as a whole. Where the necessary predicate for congressional action lies, Congress "must have wide latitude in determining" the proper means of enforcing the right. *Flores*, 521 U.S. at 519-520; see also *South Carolina*, *supra*. That includes allowing Congress to legislate based on commonsense conclusions about the scope of a problem and to enact prophylactic legislation designed to remedy difficult-to-detect discrimination and to prevent the expansion of unconstitutional treatment into new areas. See *Croson*, 488 U.S. at 490 (opinion of O'Connor, J.) (Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations").[3]

Thus, contrary to petitioner's argument, the congruence and proportionality test is not a license for judicial micromanagement of every potential application of a law. Title VII, 42 U.S.C. 2000e *et seq.*, for example, prohibits sex and race discrimination in the administration of any and all employment terms, conditions, and benefits; yet, this Court has never insisted that Congress justify its prohibitions application-by-application with a lengthy, documented re-

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[3] See also *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding a nationwide ban on literacy tests and residency requirements despite the geographically limited evidence of abuse).

cord of particularized state discrimination. That is for the commonsense reason that discrimination, by its nature, does not operate in isolated compartments. The same mindset that presumes that persons with disabilities cannot be educated, should not vote, are too much trouble to transport, and are not part of the community served by public programs and benefits, will not arbitrarily disappear in the field of licensing decisions.

A. Title II Of The Disabilities Act Is Valid Section 5 Legislation Because It Targets Distinctly Governmental Activities That Often Burden Fundamental Rights

In *Garrett*, *supra*, this Court held that Title I of the Disabilities Act, 42 U.S.C. 12111-12117, which prohibits public and private employers from discriminating in employment on the basis of disability, was not valid Section 5 legislation. The arguments of petitioner and its amicus largely assume that the invalidity of Title II's abrogation follows ineluctably from *Garrett*. See Pet. Br. 11; Va. Amicus Br. 6, 10-11. But, if Titles I and II were constitutionally indistinguishable, this Could would have had no reason to limit its holding in *Garrett*, 531 U.S. at 360 n.1. Moreover, petitioner's argument overlooks three critical distinctions between the two Titles.

First, in enacting Title I, Congress simply included States as employers within a general ban on employment discrimination by private employers, without considering sufficiently whether there was a distinctive problem of unconstitutional employment discrimination by the States. *Garrett*, 531 U.S. at 369-371.[4] Title II, by contrast, is a law that

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[4] In other recent federalism cases, Congress likewise sought to "place States on the same footing as private parties." *Kimel*, 528 U.S. at 82 (citation omitted); see *Alden* v. *Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act of 1968); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 631-632 (1999) (patent infringe-

Congress enacted specifically and deliberately to regulate the conduct of state and local governments *qua governments*. Congress thus was singularly focused on the historic and enduring problem of official discrimination and unconstitutional treatment on the basis of disability by "any State or local government," 42 U.S.C. 12131(1)(A) and (B).

For that reason, as *Garrett* acknowledged, Title II is predicated on a more substantial legislative record pertaining to "discrimination by the States in the provision of public services." 531 U.S. at 371 n.7; see also Section B(2) and (3), *infra*. That legislative record, in turn, led Congress to make specific findings about the historic and enduring problem of discrimination by States and their subdivisions. Contrast *Garrett*, 531 U.S. at 371 (no findings about state employment discrimination). In particular, Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * education, transportation, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). Those are areas for which States and their subdivisions are either exclusively or predominantly responsible. And the same Committee Reports that the Court in *Garrett* found lacking with regard to public employment, 531 U.S. at 371-372, are directly on point here, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the area[] of * * * public services." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 28 (1990); see also S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989) ("Discrimination still persists in such critical areas as * * * public services.").

Congress thus specifically concluded, on the basis of a weighty legislative record, that States were contributors to the "history of purposeful unequal treatment" and partici-

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ment); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Lanham Act liability).

pants in "the continuing existence of unfair and unnecessary discrimination and prejudice" against individuals with disabilities, 42 U.S.C. 12101(a)(7) and (9). When Congress focuses in that manner on the problem of unconstitutional conduct by States and their subdivisions and determines that "legislation is needed to secure the guarantees of the Fourteenth Amendment," Congress's "conclusions are entitled to much deference." *Kimel*, 528 U.S. at 81 (citation omitted).

Second, because Title I pertains only to employment, decisions made by state employers concerning individuals with disabilities implicate only the Equal Protection Clause's guarantee against irrational employment decisions. *Garrett*, 531 U.S. at 366-368. Like *Flores*, 521 U.S. at 512-514, and *Kimel*, 528 U.S. at 83, Title I thus addressed state conduct in an area where the States, as sovereigns, are given an extraordinarily wide berth and constitutional violations are infrequently found.

Title II, by contrast, enforces not only the Equal Protection Clause, but also a wide array of fundamental constitutional rights—the right to petition the government, the right of access to the courts, the right to vote, Fourth and Eighth Amendment protections, and procedural and substantive due process. Indeed, Title I dealt only with the States' denial of an opportunity—state employment—to individuals who equally could pursue employment in the private sector. Title II, by contrast, regulates state and local governments when they intervene in and regulate the activities of private citizens, or deprive them of their liberty, property, or parental rights. Title II also regulates a State's ability to deny a class of citizens access to government services upon which all citizens must rely for basic opportunities (and sometimes the necessities) of modern life. The private sector cannot provide medical licenses, or the ability to cast a ballot, file a lawsuit, secure the protection of the police, or seek the enactment of legislation. Title II thus

legislates in an area where the States' conduct often is subject to heightened scrutiny, and where their ability to infringe those rights generally, let alone to deny them disparately to one particular segment of the population based on stereotypes, fears, economics, or administrative convenience, is constitutionally curtailed.

Third, unlike *Kimel* and *Garrett*, this case potentially implicates concerns beyond abrogation and the ability of individuals to sue the States for money damages. Because both *Kimel* and *Garrett* targeted *employment* discrimination, those decisions only invalidated the statutes' abrogation provisions; the substantive prohibitions of those laws remain applicable to the States under Congress's Commerce Clause power and can be enforced against state officials under *Ex parte Young*, 209 U.S. 123 (1908). See *Garrett*, 531 U.S. at 374 n.9; *EEOC* v. *Wyoming*, 460 U.S. 226, 235-243 (1983). While petitioner now concedes that Title II's substantive provisions are valid Commerce Clause legislation (Br. 5), that was not its position below (Pet. Supp. C.A. Br. 26, 28). Nor is it the position of other States, who have emphasized Title II's coverage of public services and operations regardless of their nexus to commerce, and its direct regulation of the government *qua* government.[5] Accordingly, unless Title II is appropriate Commerce Clause legislation, this case implicates concerns well beyond the narrow question of abrogation in licensing cases.

For all of those reasons, and especially because this case may implicate the constitutional authority for enactment of Title II's substantive prohibitions as applied to all levels of government, this Court is not constrained, as it was in *Garrett*, to consider only the legislative evidence of uncon-

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[5] See *Thompson* v. *Colorado*, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001), cert. denied, 122 S. Ct. 1960 (2002); *Florida* v. *Rendon*, 832 So. 2d 141, 146 n.5 (Fla. Dist. Ct. App. 2002); *Meyers* v. *Texas*, No. 02-50452 (5th Cir.) (pending).

stitutional conduct by the States. When Congress specifically focuses the substantive provisions of Section 5 legislation jointly on the operations of state and local governments *qua* governments, its enforcement powers under Section 5, like the substantive protections of Section 1, can charge the States with some responsibility for the unconstitutional conduct of the subdivisions of government that the States themselves create and empower to act.[6] That is, in part, because the line between state and local government is much harder to discern in the context of public services than it is in employment.

While state and local employment decisions can be made independently, the operations of state and local governments in the provision of government services, such as voting, education, welfare benefits, zoning, licensing, and the administration of justice are often inextricably intertwined. In education, for example, the State plays a substantial role in directing, supervising and limiting the discretion of local agencies, either by administrative supervision or by statutory direction. The complexity of the relationship between state and local governments in the administration of public services often raises difficult, state-by-state questions regarding whether a particular entity is operating as an "arm of the state." In some cases, the local government officials act at the direct behest of the State government pursuant to State mandates. And in all cases, the local government is able to discriminate only because it exercises power delegated to it by the State. The record of historic and pervasive discrimination and unconstitutional treatment by all levels of government further blurs the line between state and local governmental action, because the conduct of local officials is traceable, at least in part, to the rules of

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[6] See *Atkin* v. *Kansas*, 191 U.S. 207, 220-221 (1903); see also *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270-271 (1985) (Rehnquist, J., dissenting).

state-mandated discrimination and segregation under which they operated for years.

Indeed, under similar circumstances, this Court has recognized the relevance of local governmental conduct in assessing the validity of Section 5 legislation as applied to the States. In *Garrett*, the Court cited the substantive provisions of the Voting Rights Act of 1965, which were upheld in *South Carolina*, *supra*, as "appropriate" Section 5 legislation regulating the States because the Act was predicated upon a documented "problem of racial discrimination in voting." *Garrett*, 531 U.S. at 373 (citing 383 U.S. at 312-313). Much of the evidence of unconstitutional conduct described in *South Carolina*, 383 U.S. at 312-314, however, involved the conduct of *county* and *city* officials.[7] Indeed, almost all of the evidence of specific instances of discrimination underlying the Voting Rights Act of 1965 concerned local officials rather than state officials; the rest of the evidence was either statistical evidence or lists of state laws.[8] See

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[7] See 383 U.S. at 312 n.12 (discussing discrimination by Montgomery County Registrar); *id.* at 312 n.13 (discussing discrimination by Panola County registrar and Forrest County registrar); *id.* at 313 n.14 (citing a case that documents discrimination by the Dallas County Board of Registrars); *id.* at 313 n.15 (citing a case that documents discrimination by the Walker County registrar); *id.* at 314 ("certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls"); *id.* at 314-315 (discussing discrimination in Selma, Alabama and Dallas County).

[8] See, *e.g.*, *Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 5-8 (1965) (extensive voting discrimination by local officials in Selma, Alabama, and Dallas County); *id.* at 8 (local sheriff and deputy sheriff in Mississippi beat three black men when they attempted to register to vote); *id.* at 36 (21 of 22 voting discrimination lawsuits filed by the Department of Justice in Mississippi were against counties); *Voting Rights: Hearings Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 12 (1965) (discrimination in Clarke County, Mississippi, and Wilcox County, Alabama); H.R. Rep. No. 439, 89th Cong., 1st Sess. 16 (1965) (resistance of parish registrars to registration of black citizens); S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 7-9 (1965) (discrimination and litigation in Dallas County,

also *Flores*, 521 U.S. at 530-531 (in analyzing Section 5 as a source of power for substantive provisions of a law, the Court did not distinguish between evidence of state and local governmental conduct). In sum, while Congress compiled ample evidence of unconstitutional conduct by the States themselves in enacting Title II, the constitutional question presented here, unlike *Garrett*, compels consideration of the evidence of local government discrimination as well.

B. After An Exhaustive Investigation, Congress Found Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Individuals With Disabilities

Petitioner insists that "nothing in the legislative record underlying enactment of [Title II] shows evidence of invidious discrimination by States against persons with disabilities in *any* activity undertaken by States." Pet. Br. 18; see also Va. Amicus Br. 10. That argument is profoundly mistaken.

1. Congress Exhaustively Investigated Governmental Discrimination On The Basis Of Disability

Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring). Indeed, in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this Court acknowledged the superior expertise of legislatures in addressing the problem of disability discrimination. *Id.* at 445. "One appropriate source" of evidence for Congress to consider in combating disability discrimination

> is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of

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Alabama); *id.* at 12 (counties' discriminatory use of "good moral character" test); *id.* at 33 (county officials' discriminatory use of poll tax).

> national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 503 (Powell, J., concurring); see also *South Carolina*, 383 U.S. at 330 ("In identifying past evils, Congress obviously may avail itself of information from any probative source.").

The Congress that enacted Title II of the Disabilities Act brought to that legislative process more than forty years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination. See *Garrett*, 531 U.S. at 390-391 (Breyer, J., dissenting) (listing prior legislation). Building on that expertise, Congress commissioned two reports from the National Council on the Handicapped, an independent federal agency, to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities.[9] That study revealed that "the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unnecessary discrimination." National Council on the Handicapped, *On the Threshold of Independence* 2 (1988) (*Threshold*); see National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* (1986). Persons with disabilities reported "denials of educational opportunities, lack of access to public buildings and public bathrooms, [and] the absence of accessible transportation." *Threshold* 20-21, 41. Congress also learned of an "alarming rate of poverty," a dramatic educational gap, a "Great Divide" in employment,

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[9] See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1829.

and a life of social "isolat[ion]" for persons with disabilities. *Id.* at 14.[10]

Congress itself engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted specifically to consideration of the Disabilities Act. See *Garrett*, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings). In addition, a congressionally designated Task Force held 63 public forums across the country that were attended by more than 30,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 16 (1990) (*Task Force Report*). The Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination persons with disabilities face daily—often at the hands of state and local governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1040 (Comm. Print 1990) (*Leg. Hist.*).[11]

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[10] Twenty percent of persons with disabilities—more than twice the percentage for the general population—lived below the poverty line, and 15% of disabled persons had incomes of $15,000 or less. *Threshold* 13-14. Forty percent of persons with disabilities—triple the rate for the general population—did not finish high school. Only 29% of persons with disabilities had some college education, compared with 48% for the general population. *Id.* at 14. Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Ibid.* Two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never go to grocery stores. *Id.* at 16-17.

[11] See also *Task Force Report* 16. The Task Force submitted those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" to Congress, 2 *Leg. Hist.* 1324-1325, as part of the official legislative history of the Disabilities Act. See *id.* at 1336, 1389. In *Garrett*, the United States lodged with the Clerk a complete set of those submissions. See 531 U.S. at 391-424 (Breyer, J., dissenting). Those submissions are cited herein by reference to the State and

Congress also considered several reports and surveys. See S. Rep. No. 116, *supra*, at 6; H.R. Rep. No. 485, *supra*, Pt. 2, at 28; *Task Force Report* 16.[12]

2. Congress Amassed Voluminous Evidence Of Historic And Enduring Discrimination And Deprivation Of Fundamental Rights By States

a. *Historic Discrimination*: The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999) (quoting *Flores*, 521 U.S. at 525). While petitioner and its amicus ignore it, Congress and this Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment'" of persons with disabilities. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

"[T]orture, imprisonment, and execution of handicapped people throughout history are not uncommon." United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 18 n.5 (1983) (*Spectrum*). More often, "societal practices of isolation and segregation have been the

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Bates stamp number, which is how the submissions were lodged in *Garrett*.

[12] Those included the United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983); two polls conducted by Louis Harris & Assocs., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), and Louis Harris & Assocs., *The ICD Survey II: Employing Disabled Americans* (1987); a report by the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988); and eleven interim reports submitted by the Task Force.

rule." *Ibid.* From the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. *Id.* at 20. Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[13] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents, sometimes at risk of criminal prosecution, to report and segregate into institutions the "feebleminded."[14]

Almost every State accompanied forced segregation with compulsory sterilization and prohibitions of marriage. See *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if * * * society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles are enough."); 3 *Leg. Hist.* 2242 (James Ellis); M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855, 887-888 (1975) (*Unequal Treatment*). Children with mental disabilities "were excluded completely from any form of public education." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982). Numerous States also restricted the rights of physically disabled people to enter into contracts, *Spectrum* 40, while a number of large cities enacted "ugly laws," which prohibited the physically disabled from appearing in public. Chicago's law provided:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting ob-

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[13] See People First Amicus Br., App. A, *Alsbrook* v. *City of Maumelle*, No. 99-423 (*Compendium of State Laws*); see also Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[14] *Spectrum* 20, 33-34; *Compendium of State Laws* A5, A21-A22, A25, A28-A29, A40, A44, A46-A49, A50-A51, A56, A61-A63, A65-A66, A71, A74-A75.

> ject or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

Unequal Treatment 863 (quoting ordinance). Such laws were enforced as recently as 1974. *Id.* at 864.[15]

b. *Enduring Discrimination and Deprivation of Fundamental Rights*: "Prejudice, once let loose, is not easily cabined," whether based on race, sex, or disability. *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring). Indeed, Congress specifically found that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.[16]

That is because the process of changing discriminatory laws, policies, practices, and stereotypical conceptions and prejudices did not even *begin* until the 1970s and 1980s. Even then, "out-dated statutes [were] still on the books, and

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[15] See also *State* v. *Board of Educ.*, 172 N.W. 153, 154 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 3 *Leg. Hist.* 2243); see generally T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-407 (1991).

[16] See also 3 *Leg. Hist.* 2020 (Att'y Gen. Thornburgh) ("But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society—notions that have, in large measure, been created by ignorance and maintained by fear."); 2 *Leg. Hist.* 1606 (Arlene Mayerson) ("Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history.").

irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Cleburne*, 473 U.S. at 467 (Marshall, J., concurring) (emphasis added). The involuntary sterilization of the disabled is not distant history; it continued into the 1970s, and occasionally even into the 1980s—well within the lifetime of many current governmental decisionmakers. P. Reilly, *The Surgical Solution* 2, 148 (1991); National Public Radio, *Look Back at Oregon's History of Sterilizing Residents of State Institutions* (Dec. 2, 2002). As recently as 1983, fifteen States continued to have compulsory sterilization laws on the books. *Spectrum* 37; see also *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year old girl); Reilly, *supra*, at 148-160.

Until the late 1970s, "peonage was a common practice in [Oregon] institutions." Governor J. Kitzhaber, *Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization* (Dec. 2, 2002). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring). New Mexico recently reaffirmed its unqualified exclusion of "idiots [and] insane persons" from voting. New Mexico, *Official 2002 General Election Results by Office* (Dec. 2002).

Based on the evidence it amassed, Congress found, as a matter of present reality and historical fact, that persons with disabilities have been and are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid*, 527 U.S. at 645 (citation omitted); see also 42 U.S.C. 12101(a)(2) and (3). In particular, Congress discerned a substantial risk that persons with disabilities will be unconstitutionally denied an equal opportunity to obtain vital services and to exercise fundamental rights, and will be

subjected to unconstitutional treatment in the form of arbitrary or irrational distinctions and exclusions, and disparity in treatment as compared to other similarly situated groups, *Garrett*, 531 U.S. at 366 n.4.

(1) Education: "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, where the State provides a public education, that right "must be made available to all on equal terms." *Ibid.* But Congress learned that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. As recently as 1975, approximately 1 million disabled students were "excluded entirely from the public school system." 42 U.S.C. 1400(c)(2)(C). A quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material." VT 1635. Other school districts also simply labeled as mentally retarded a blind child and a child with cerebral palsy. NB. 1031; AK 38 (child with cerebral palsy subsequently obtained a Masters Degree). "When I was 5," another witness testified, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[17]

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[17] See also 136 Cong. Rec. 10913 (1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect the others" but because "some parents were afraid he would"); UT 1556 (disabled student refused admission to first grade because teacher refused to teach student with a disability); NY 1123 (three elementary schools had practice of locking mentally disabled children in a 3'x 3'x 7' box for punishment); *Spectrum* 28, 29 ("a great

Indeed, while petitioner categorically denies (Br. 18) any discrimination, on the eve of Title II's enactment, the California Attorney General reported that, in California schools (which are arms of the state, *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993)), "[a] bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability," and that, in one town, all children with disabilities are grouped into a single classroom regardless of individual ability. California Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989) (*Cal. Report*).

State institutions of higher education acted on the same stereotypes and prejudices. Indeed, the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." *Spectrum* 28; see also note 10, *supra*. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id.* at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured,

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many handicapped children" are "excluded from the public schools" or denied "recreational, athletic, and extracurricular activities provided for non-handicapped students"); *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess. Pt. 2, at 793 (1973) (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id.* Pt. 1, at 400 (Mrs. R. Walbridge) (student with spina bifida barred from the school library for two years "because her braces and crutches made too much noise"). For additional examples, see *id.* at 384 (Peter Hickey); 2 *Leg. Hist.* 989 (Mary Ella Linden); PA 1432; NM 1090; OR 1375; AL 82; SD 1481; MO 1014; NC 1144; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." WA 1733. Similarly, an Education student was denied a student teaching assignment because administrators thought the students would react badly to her appearance. OR 1384.[18]

For both good and ill, "the law can be a teacher." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). As with race discrimination, few governmental messages more profoundly affect individuals and their communities than the message that individuals with disabilities should be segregated in education:

> Segregation in education impacts on segregation throughout the community. Generations of citizens attend school with no opportunity to be a friend with persons with disabilities, to grow together, to develop an awareness of capabilities—all in the name of benevolence! Awareness deficits in our young people who become our community leaders and employers perpetuate the discrimination fostered in the segregated educational system.

MO 1007 (Pat Jones).

(ii) Voting: Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the

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[18] See also 2 *Leg. Hist.* 1224 (Denise Karuth) (state university professor asked a blind student enrolled in his music class "What are you doing in this program if you can't see"; student was forced to drop class); *id.* at 1225 (state commission refuses to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); J. Shapiro, *No Pity* 45 (1993) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work"). For additional examples, see SD 1476; LA 999; MO 1010; WIS 1757; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting); *Cal. Report* 138; Appendix A, *infra*.

right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 561-562 (1964). But Congress found that persons with disabilities have been "relegated to a position of political powerlessness," 42 U.S.C. 12101(a)(7), and continue to be subjected to discrimination in voting, 42 U.S.C. 12101(a)(3). Congress made that finding after hearing that "people with disabilities have been turned away from the polling places after they have been registered to vote because they did not *look* competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen) (emphasis added). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature,'" and then invented a reason to reject the registration. *Id.* at 1219. A deaf voter was told that "you still have to be able to use your voice" to vote. *Equal Access to Voting for Elderly & Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Voting Hearings*).[19]

The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic

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[19] One voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." *Equal Voting Hearings* 45. "A blind woman, a new resident of Alabama, went to vote and was refused instructions on the operation of the voting machine." AL 16; see also *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples); *Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 13 (2001) (James Dickson) ("I am blind, and I have never cast a secret ballot."); *id.* at 15 ("Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. * * * [T]o this day I really do not know if they cast my ballot according to my wishes.").

rights as an American" because polling places or voting machines are inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *Americans with Disabilities Act 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped and the Senate Comm. on Labor & Human Res.*, 101st Cong., 1st Sess. 76 (1989) (*May 1989 Hearings*) (Ill. Att'y Gen. Hartigan) (same). Voting by absentee ballot also "deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day." 2 *Leg. Hist.* 1745 (Nanette Bowling).[20] "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" ARK 155.

(iii) Access to the courts: The Fourteenth Amendment protects the rights of civil litigants, criminal defendants, and members of the public to have access to the courts. See, *e.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). Yet Congress learned that "[t]he courthouse door is still closed to Americans with disabilities"—literally. 2 *Leg. Hist.* 936 (Sen. Harkin).

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who * * * told me there was an entrance at the back door for the handicapped people. * * * I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my

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[20] See also *Equal Voting Hearings* 17, 461 (criticizing States' imposition of special absentee voting requirements on persons with disabilities). For examples of inaccessible polling places, see 2 *Leg. Hist.* 1767 (Rick Edwards); WIS 1756; MT 1024, 1026-1027; MI 922; ND 1185; DE 307; WIS 1756; AL 16; *Garrett*, 531 U.S. at 395-424 (Breyer, J., dissenting); FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

> arrival so that somebody would come and open the door and maybe let me in. * * * This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. * * * And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came back to me and told me, "You are not the norm. You are not the normal person we see every day."

Id. at 1070-1071 (Emeka Nwojke). Such differential treatment affects not only the ability to get into the courthouse, but also the ability to be heard and participate effectively and meaningfully in judicial proceedings.[21]

(iv) Access to government officials and proceedings "The very idea of a government, republican in form, implies a right on the part of its citizens to * * * petition for a redress of grievances," *United States* v. *Cruikshank*, 92 U.S. 542, 552-554 (1875), and that right cannot be denied to an entire class of citizens without compelling justification, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). State governments must "act as neutral entities, ready to take instruction and to enact laws when their citizens so demand." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). But government cannot take instruction from those whom it cannot see or hear. The Illinois Attorney General testified that he "had innumerable complaints regarding lack of ac-

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[21] See ID 506 (adult victims of abuse with developmental disabilities denied equal rights to testify in court); Consol. Gov't C.A. Br. at 3, *Lane* v. *Tennessee*, 315 F.3d 680 (6th Cir. 2003) (No. 98-6730) (Lane arrested for two misdemeanors and ordered to report for hearing at inaccessible courthouse; the first day he crawled up the stairs to the courtroom; the second day he was arrested for failure to appear when he refused to crawl or be carried up the stairs; hearing later held with defendant forced to remain outside while counsel shuttled between him and the courtroom). For additional examples of inaccessible courthouses and court proceedings, see AL 15; WV 1745; MA 812; CA 254; CO 273; ID 528; PA 1394; MS 998; WA 1690; MS 990; SD 1475; NC 1161-1164; AL 5; DE 345; GA 374; HI 455; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

cess to public services—people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building," and that "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them." *May 1989 Hearings* 488, 491. Another individual, "who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room." IN 626. Access to other important government buildings and officials depended upon the individual's willingness to crawl or be carried.[22]

(v) Law enforcement: Persons with disabilities have also been victimized in their dealings with law enforcement, in violation of their Fourteenth Amendment right to due process and protection from unreasonable searches and seizures. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification. NM 1081. A person in a wheelchair

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[22] See *Spectrum* 39 (76% of State-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); *May 1989 Hearings* 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); AK 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped and disabled."; City Manager responded that "he runs this town * * * and no one is going to tell him what to do."). For additional examples of inaccessible government officials and offices, see H.R. Rep. No. 485, *supra*, Pt. 2, at 40; *May 1989 Hearings* 76; IN 651; WIS 1758; NY 1119; *Cal. Report* 70; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

was given a ticket and six months' probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. VA 1684. Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 *Leg. Hist.* 1331. A parole agent "sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though * * * he could not make the appointments because he was unable to get accessible transportation." *Cal. Report* 103.[23]

(vi) Child custody: This Court has long recognized that the Constitution protects and respects the sanctity of the parent-child relationship. See, *e.g.*, *Troxel* v. *Granville*, 530 U.S. 57 (2000); *Stanley* v. *Illinois*, 405 U.S. 645 (1972). In addition, the Due Process Clause requires States to afford individuals with disabilities fair child custody proceedings, including the opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970) (citation and quotation marks omitted). But the Task Force Chairman testified that "clients whose chil-

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[23] See also 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town due to car trouble); *id.* at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); *Task Force Report* 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); TX 1541 (police refused to take an assault complaint from a person with a disability); LA 748 (police called to Burger King because staff believed disabled customer was acting strangely, and made the customer leave town); AL 6, DE 345, KS 673, WV 1746, IL 572 (all: lack of interpreter for deaf arrestee). For additional examples of harassment and inappropriate treatment, see 2 *Leg. Hist.* 1196 (Cindy Miller); IL 569-570, 583; *Cal. Report* 101-104; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting). In addition, persons with disabilities, like epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50.

dren have been taken away from them a[re] told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?" 2 *Leg. Hist.* 1331 (Justin Dart). Another government agency refused to authorize a couple's adoption of a child solely because the woman had muscular dystrophy. MA 829.[24]

(vii) Institutionalization: The Constitution protects individuals with disabilities from unjustified institutionalization and from unduly severe treatment while institutionalized. *Youngberg* v. *Romeo*, 457 U.S. 307, 315, 322 (1982). Yet unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were commonplace. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state law ineffective; state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id.* at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[25]

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[24] See also H.R. Rep. No. 485, *supra*, Pt. 3, at 25 ("These discriminatory polices and practices affect people with disabilities in every aspect of their lives * * * [including] securing custody of their children."); *id.* Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk—it has meant being * * * deemed an 'unfit parent'" in custody proceedings.); 2 *Leg. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."); *Spectrum* 40; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples); *Shapiro*, *supra*, at 26 (woman with cerebral palsy denied custody of her two sons; children placed in foster care instead); *In re Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped"); Appendix A, *infra*.

[25] See also Gov. Kitzhaber, *supra* (admitting the use of "inhumane devices to restrain and control patients" until "the mid 1980's"); *Cal. Report* 114; 132 Cong. Rec. 10589 (1986) (Sen. Kerry) (findings of

Indeed, in the years immediately preceding enactment of the Disabilities Act, the Department of Justice found unconstitutional treatment of individuals with disabilities in state institutions for the mentally retarded or mentally ill in more than half of the States. One facility forced mentally retarded residents to inhale ammonia fumes as a form of punishment. See Notice of Findings Regarding Los Lunas Hosp. & Training Sch. 2. Residents in other facilities lacked adequate food, clothing and sanitation. Many state facilities failed to provide basic safety to individuals with mental illness or mental retardation, resulting in serious physical injuries, sexual assaults, and deaths. See Appendix B, *infra*.

(viii) Zoning: Congress knew that *Cleburne*, where this Court found unconstitutional discrimination in a zoning decision based on irrational fears and stereotypes, was not an isolated incident. In Wyoming, a zoning board declined to authorize a group home because of "local residents' un-

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investigation of State-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("it became quite clear * * * that the personnel regarded patients as animals, * * * and that group kicking and beatings were part of the program"); *id.* at 191-192 (Dr. Philip Roos); *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey state institutions); *Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages. A number of those residents * * * had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement."); *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples).

founded fears that the residents would be a danger to the children in a nearby school." WY 1781. In New Jersey, a group home for those who had suffered head injuries was barred because the public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam.' * * * Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles." NJ 1068.[26]

(ix) Licensing: Petitioner erroneously argues (Br. 18-24) that the legislative record is devoid of evidence of discriminatory treatment in licensing. The House Report discussed a woman who was denied a teaching credential, not because of her substantive teaching skills, but because of her paralysis. H.R. Rep. No. 485, *supra*, Pt. 2, at 29. See also 2 *Leg Hist.* 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching") (quoting *Heumann* v. *Board of Educ.*, 320 F. Supp. 623 (S.D.N.Y. 1970)); WY 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible).[27]

(x) Public transportation: Individuals reported discriminatory treatment on public transportation that lacked any rational basis and that "made no sense in light of how the [government] treated other groups similarly situated in

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[26] For additional examples, see 2 *Leg. Hist.* 1230 (Larry Urtan); AL 2, 31; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) Appendix A, *infra*.

[27] See also CA 261 (discrimination in licensing teachers); HI 479 (discrimination in licensing); TX 1549 (state licensing requirements for teaching deaf students include the ability to hear); TX 1528 & 1542 (interpreters and readers not allowed for licensing exams); TX 1543 (blind applicant not allowed to take state chiropractor's exam because she could not read x-ray without assistance); *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples).

relevant respects." *Garrett*, 531 U.S. at 366 n.4. One student testified:

> Some of the drivers are very rude and get mad if I want to take the bus. Can you believe that? I work and part of my taxes pay for public buses and then they get mad just because I am using a wheelchair. * * * It is hard for people to feel good about themselves if they have to crawl up the stairs of a bus, or if the driver passes by without stopping.

2 *Leg. Hist.* 993 (Jade Calegory); MA 831 ("Blacks wanted to ride in the front of the bus. Disabled people just want[] on."). A high-level Connecticut transportation official responded to requests for accessibility by asking "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." *Id.* at 1085 (Edith Harris).[28]

(xi) Prison conditions: The Eighth Amendment protects inmates with disabilities against treatment that is deliberately indifferent to their serious medical needs and safety or imposes wanton suffering. *Farmer* v. *Brennan*, 511 U.S. 825 (1994); *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). But Congress heard that "their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190 (Cindy Miller). Another prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986).[29]

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[28] For additional examples, see 2 *Leg. Hist.* 1097 (Bill Dorfer); *id.* at 1190 (Cindy Miller); WA 1716; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

[29] See also *Spectrum* 168 (discrimination in treatment and rehabilitation programs available to inmates with disabilities; inaccessible jail cells and toilet facilities); NM 1091 (prisoners with developmental disabilities subjected to longer terms of imprisonment); Appendices A & B, *infra*. The Attorney General's enforcement activities revealed that individuals

(xii) Other public services: The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy isolating the problem into select categories of state action. Services and programs as varied as the operation of public libraries,[30] public swimming pools and park programs,[31] homeless shelters,[32] and benefit programs[33] exposed the discriminatory attitudes of officials.

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awaiting placement in State mental institutions in Mississippi were held in a county jail and routinely left for days shackled in a "drunk tank" without any mental health treatment or supervision. Notice of Findings Regarding Hinds County Detention Ctr. 3 (1986).

[30] See 2 *Leg. Hist.* 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); PA 1391 (same rule for library cards for "those having physical as well as mental disabilities").

[31] A paraplegic Vietnam veteran was forbidden to use a public pool; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Leg. Hist.* 1872 (Peter Addesso); see also *id.* at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); WIS 1752 (deaf child denied swimming lessons); NC 1156 (mentally retarded child not allowed in pool because of "liability risk"); CA 166 (inaccessible public recreation site); MS 855 (same); *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule"); NC 1155 (blind people told not to participate in regular parks and recreation programs).

[32] CA 216 (wheelchair users not allowed in homeless shelter); CA 223 (same); DE 322 (same for mentally ill).

[33] See 2 *Leg. Hist.* 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); *id.* at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where * * * State human resources [*sic*] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend"); IA 664 (person with mild mental retardation denied access to literacy program); KS 713 (discrimination in state job training program); IL 533 (female disability workshop participants advised to get sterilized); AK 72 (no interpreter for deaf at state motor vehicles department). For examples of inaccessible social service

3. Other Evidence Confirms The Problem

In *Garrett*, Justice Kennedy suggested that, if a widespread problem of disability discrimination existed, "one would have expected to find * * * extensive litigation and discussion of the constitutional violations." 531 U.S. at 376 (Kennedy, J., concurring). Appendix A to this brief provides a non-exhaustive list of cases in which courts have found discrimination and the deprivation of fundamental rights on the basis of disability. Many of the cases specifically found constitutional violations. In others, the facts support that conclusion, but the existence of statutory relief allowed the court to avoid the constitutional question. Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. See *South Carolina*, 383 U.S. at 312 (considering evidence collected in Department of Justice investigations). In public reports, the Department of Justice has either litigated or settled dozens of cases to ensure access to the courts and other government buildings, reasonable treatment by law enforcement officials, and protection against other forms of discrimination that implicate important constitutional rights.[34] In addition, the Department of

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agencies, see AK 145; OH 1218; AZ 116; AZ 127; HI 456; ID 541; see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises).

[34] Many of these reports, *Enforcing the ADA: A Status Report from the Department of Justice*, are available at <http://www.usdoj.gov/crt/ada>. See, *e.g.*, Oct.-Dec. 2001 Report 9 (candidate for city council who uses a wheelchair unable to access a city council platform to address constituents); Apr.-June 1998 Report 8-10 (absence of communication assistance results in longer pre-trial detention for detainees with disabilities and denial of medical treatment and communication with family members); July-Sept. 1997 Report 7-9 (State general assembly inaccessible for lobbyists with mobility impairments; lack of effective participation in court proceedings); Apr.-June 1997 Report 5-7 (blind voters; inaccessible courts; unreasonable treatment during traffic stop of deaf motorist); Oct.-Dec. 1994 Report 4-6 (access to town hall; effective participation in court proceedings; inaccessible polling places); *Enforcing the ADA:*

Justice has found unconstitutional treatment of individuals with disabilities in institutions or prisons in more than 30 States. See Appendix B, *infra*.

4. *Special Significance Of Discrimination In Government Services*

The foregoing record of extensive state and local discrimination in the provision of government services provides a solid predicate for exercise of Congress's Section 5 enforcement power, for three reasons. *First*, in *Garrett*, this Court held that evidence of "hardheaded[]—and perhaps hardhearted[]"—employment discrimination based on disability did not violate the Constitution if it could be justified by "any reasonably conceivable state of facts that could provide a rational basis for the classification." 531 U.S. at 367-368. The constitutional balance under Title II, however, is quite different. Much of the identified state conduct interferes with or threatens the fundamental rights of individuals with disabilities, or occurs where the right to equal protection intersects with other constitutional rights, see *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 881 (1990). Such violations are subject to more intense scrutiny and cannot be justified by any conceivable rationale. A particular class of individuals cannot be excluded from voting, participating in court proceedings, accessing public meetings and services, or raising their children based on nothing more than administrative convenience. Rather, such infringements are unconstitutional "unless shown to be necessary to promote a *compelling* governmental interest." *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969); see also *Troxel*, 530 U.S. at 65 (plurality opinion); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988).

Looking Back on a Decade of Progress 4-8 (July 2000) (access to public meetings and public offices, to courts and court proceedings; fair treatment by law enforcement).

Second, much of the identified conduct fails rational basis scrutiny. Even that low constitutional threshold cannot justify beating a deaf student for failure to follow spoken instructions, refusing to let individuals with disabilities on buses, excluding a paralyzed veteran from a public swimming pool, or denying a disabled student a college education either because "it would be 'disgusting' to [her] roommates to have to live with a woman with a disability," or because of groundless stereotypes that blind people cannot teach, provide competent rehabilitation counseling, or succeed in a music course. This Court reaffirmed in *Garrett* that "mere negative attitudes, or fear," alone cannot justify disparate treatment of those with disabilities. 531 U.S. at 367.

Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated, *Garrett*, 531 U.S. at 366 n.4; *Cleburne*, 473 U.S. at 447-450, or if it is based on "animosity" towards the disabled, *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). It accordingly is not enough that the State can offer a rational basis—such as finances—for failing to offer benefit information or services in handicap-accessible formats if the State is already accommodating the special communication needs of other constituents by offering such information in, for example, Spanish. Police may not refuse to take complaints from blind individuals, while taking them from victims who were blindfolded or unconscious. Moreover, many of the instances of discriminatory treatment reported to Congress arose in contexts, like education and zoning, where state actors already make accommodations for other groups, but are selectively resistant to doing so for those with disabilities.

Third, based on the record before it, Congress could reasonably conclude that the aggregate effect of consistently excluding individuals with disabilities from a broad range of important government services caused a constitutional problem that is greater than the sum of its parts. The consistent

distribution of benefits and services in a way that maintains a permanent subclass of citizens is inimical to the core purposes of the Equal Protection Clause. See *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 623 (1985); *Plyler* v. *Doe*, 457 U.S. 202, 213 (1982). States cannot balance their budgets or allocate their resources in a manner that "divide[s] citizens into * * * permanent classes" and apportions "rights, benefits and services according to" their class. *Zobel* v. *Williams*, 457 U.S. 55, 64 (1982).

5. State Laws Provided Insufficient Protection

Petitioner argues (Br. 24-26) that the existence of state laws prohibiting some forms of disability discrimination made congressional action unnecessary. But that argument confuses existence with effectiveness. Evidence before Congress demonstrated that state laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, *supra*, at 18; see also *ibid.* (section of report entitled "CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE"); H.R. Rep. No. 485, *supra*, Pt. 2, at 47 (same).[35]

State officials themselves broadly agreed with that assessment. The 50 State Governors' Committees "report[ed] that existing State laws do not adequately counter * * * discrimination." S. Rep. No. 116, *supra*, at 18; H.R. Rep. No. 485, *supra*, Pt. 2, at 47. California itself noted that "gaps" and "contradictions" in state law justified enactment of the Disabilities Act. *Cal. Report* 22-23. The Illinois Attorney General testified that "[p]eople with disabilities should not have to win these rights on a State-by-State basis," and that

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[35] See also 136 Cong. Rec. 11455 (1990) (Rep. Wolpe), *id.* at 11461 (Rep. Levine); 134 Cong. Rec. 9384-9385 (1988) (Sen. Simon); 2 *Leg. Hist.* 963 (Sandra Parrino); *id.* at 967 (Adm. James Watkins) ("Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action."); *id.* at 1642-1643 (Arlene Mayerson) (noting variations and gaps in coverage of state statutes); 3 *Leg. Hist.* 2245 (James Ellis); AL 24 (failure to enforce laws protecting persons with disabilities); AK 52 (same).

"[i]t is long past time * * * [for] a national policy that puts persons with disabilities on equal footing with other Americans." *May 1989 Hearings* 77.[36]

In addition, petitioner exaggerates the coverage of state laws. See generally J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 261 (1986) (detailing gaps in coverage of state laws). Prior to 1990, nearly half of the States did not protect persons with mental illness and/or mental disabilities. See *id.* at 278-280. New Hampshire excluded disabilities caused by illness, N.H. Rev. Stat. Ann. § 354-A:3(XIII) (1984), while Arizona excluded disabilities which were first manifested after the age of 18, Ariz. Rev. Stat. § 36-551(11)(b) (1986). Flaccus, *supra*, at 285. Few States protected against discrimination based on either a perceived disability or a history of illness such as cancer. See B. Hoffman, *Employment Discrimination Based on Cancer History*, 59 Temp. L.Q. 1 (1986). Many States failed to provide for private rights of action and compensatory damages, effectively leaving victims of discrimination without enforceable remedies. *Id.* at App. B; Flaccus, *supra*, at 300-310, 317-321.[37]

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[36] Other state and local officials echoed those sentiments. See Department of Health & Human Servs., *Visions of: Independence, Productivity, Integration for People with Developmental Disabilities* 29 (1990) (19 States strongly recommended passage of the Disabilities Act); 2 *Leg. Hist.* 1050 (Elmer Bartels, Mass. Rehab. Comm'n); *id.* at 1455-1456 (Nikki Van Hightower, Treas., Harris Co., Tex.); *id.* at 1473-1474 (Robert Lanier, Chair, Metro. Transit Auth. of Harris Co., Tex.); *id.* at 1506 (Texas State Sen. Chet Brooks) ("We cannot effectively piece these protections together state by state."); *id.* at 1508; *May 1989 Hearings* 778 (Ohio Governor). Indeed, state officials themselves had "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 87 (Apr. 1989).

[37] See also *May 1989 Hearings* 386-394 (lengthy analysis of state laws); 3 *Leg. Hist.* 2245 (James Ellis) ("state laws have not provided substantial

Furthermore, petitioner's assertions concerning the effectiveness of those laws cannot supplant Congress's findings based on the first-hand testimony of witness after witness about the instances of discrimination they faced and the ineffectiveness of state laws. Although there may be specific contexts, such as Section 5 legislation designed to remedy violations of the Takings Clause or the privilege against self-incrimination, in which the lack of a state remedy may be relevant to the existence of a constitutional violation, cf. *Florida Prepaid*, 527 U.S. at 642-643, the *possibility* of a state remedy for discrimination does not make the underlying conduct constitutional. Just as state laws against race discrimination have neither eradicated the problem nor undermined the basis for subjecting state employers to federal prohibitions,[38] Congress was equally justified in concluding that state laws against disability discrimination had generally been ineffective in combating the lingering effects of prior official discrimination and exclusionary laws and policies and, more importantly, in changing the behavior of individual state actors.

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protection to people with disabilities"); *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunity of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 62 (1985) (Rep. Moakley) ("[O]ne-fourth of the states have no protection for the handicapped. Additionally, even those states with laws differ greatly in their regulations.") (attaching ten-state survey showing gaps in coverage of laws).

[38] See, *e.g.*, S. Rep. No. 415, 92d Cong., 1st Sess. 19 (1971) (37 States had equal employment laws at the time Title VII was extended to the States).

C. The Disabilities Act Is Reasonably Tailored To Remedy And Prevent Unconstitutional Discrimination Against Persons With Disabilities

While Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified, *Florida Prepaid*, 527 U.S. at 639, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," *Flores*, 521 U.S. at 519-520. Thus, the relevant inquiry is not whether Title II "prohibit[s] a somewhat broader swath of conduct," *Garrett*, 531 U.S. at 365, than would the courts. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Ibid.* Rather, the question is whether, in light of the scope of the problem identified by Congress, the enactment "is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 528 U.S. at 86 (quoting *Flores*, 521 U.S. at 532). Title II is not.

1. Title II's Terms Are Tailored To The Constitutional Problems It Remedies

Because Title II targets only discrimination that threatens fundamental rights or that is unreasonable, much of Title II's operation targets conduct outlawed by the Constitution itself. As applied to discrimination in voting, child custody proceedings, criminal cases, institutionalization, conditions of confinement, interactions with law enforcement, judicial proceedings, access to public officials and offices, and other areas implicating fundamental rights, Title II tracks the Fourteenth Amendment when it prevents the disparate deprivation of those rights for invidious or insubstantial reasons.

Furthermore, Title II targets discrimination that is unreasonable and, in so doing, ensures (as this Court did in *Cleburne*, 473 U.S. at 447-450), that the government's articulated rationale for differential treatment does not mask impermissible animus and does not result in the differential treatment of similarly situated groups. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. The Disabilities Act does not require preferences and permits the denial of benefits or services if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service, 42 U.S.C. 12131(2). But once an individual proves that he can meet all the essential eligibility requirements of a program or service, especially those programs and services that implicate fundamental rights, the government's interest in excluding that individual solely "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally circumscribed. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. The Disabilities Act thus balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000).

As petitioner notes (Br. 29-30), the Disabilities Act requires "reasonable modifications" in public services, 42 U.S.C. 12131(2). That requirement, however is precisely tailored to the unique features of disability discrimination in two ways. *First*, given the history of segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on overt discrimination would be insufficient. Therefore, the Disabilities Act both prevents difficult-to-prove discrimination and af-

firmatively promotes the integration of individuals with disabilities in order to remedy past unconstitutional conduct and to prevent future discrimination.

Congress further concluded that the demonstrated refusal of state and local governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations would freeze in place the effects of those governments' prior official exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of segregation, stigma, ill treatment, neglect, and degradation. See *Gaston County*, 395 U.S. at 296-297 (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination). Congress also concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). Moreover, given the record of discrimination and unconstitutional treatment of the disabled, Congress reasonably concluded that the failure to make reasonable accommodations to the rigid enforcement of seemingly neutral criteria can often mask invidious, but difficult to prove, discrimination. Congress' Section 5 power includes the ability to ensure that constitutional violations are not left unremedied because of difficulties of proof. See, *e.g.*, *South Carolina*, 383 U.S. at 314-315.

Second, the Constitution itself already requires individualized consideration and modification of practices or programs when necessary to avoid infringing on fundamental rights.[39] Beyond that, States may not justify infringements

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[39] See, *e.g.*, *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 121-122 (1996) (transcript fee modified in appeal of parental termination, where it was "not likely to impose an undue burden on the State"); *Stanley*, 405 U.S. at 651-658 (State must provide individualized determination of father's fitness to raise his children.).

on fundamental rights by pointing to the administrative convenience or cost savings achieved by maintaining barriers to the enjoyment of those rights.[40]

The statute, moreover, requires modifications only where "reasonable," 42 U.S.C. 12131(2). Governments need not make modifications that "impose an undue hardship" or require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the program. 42 U.S.C. 12111(10), 12112(b)(5)(A); 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16 (plurality opinion). Furthermore, based on the consistent testimony of witnesses and expert studies, Congress determined that the vast majority of modifications entail little or no cost. One local government official stressed that "[t]his bill will not impose great hardships on our county governments" because "the majority of accommodations for employees with disabilities are less than $50" and "[t]he cost of making new or renovated structures accessible is less than 1 percent of the total cost of construction." 2 *Leg. Hist.* 1443 (Nikki Van Hightower, Treasurer, Harris Cty., Tex.).[41]

Title II, then, goes further than the Constitution itself only to the extent that some disability discrimination may have no impact on fundamental rights and may be rational for constitutional purposes, but still be unreasonable under

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[40] See, *e.g.*, *Little* v. *Streater*, 452 U.S. 1, 13-17 (1981) (State must pay for blood test for indigent defendant in paternity suit.); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 263 (1974); *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.").

[41] See also S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Leg. Hist.* 1552 (EEOC Comm'r Evan Kemp); *id.* at 1077 (John Nelson); *id.* at 1388-1389 (Justin Dart); *id.* at 1456-1457; *id.* at 1560 (Jay Rochlin); 3 *Leg. Hist.* 2190-2191 (Robert Burgdorf); *Task Force Report* 27; *Spectrum* 2, 30, 70; GAO, *Briefing Report on Costs of Accommodations, Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990).

the standards of the Disabilities Act. That margin of statutory protection does not exceed Congress' authority for two reasons. *First*, like Title VII on which it was modeled, that statutory protection is necessary to enforce this Court's constitutional standard by reaching unconstitutional conduct that would otherwise escape detection in court and to deter future constitutional violations.

Second, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id.* at 550 n.19 (Equal Protection Clause itself can require modification of facilities and program to ensure equal access). Title II's accommodation requirements eliminate the effects of past discrimination by ensuring that persons previously invisible to program and building designers are now considered part of the government's service constituency. "Just as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons. It is exclusive *designs*, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." 3 *Leg. Hist.* 1987 n.4 (Laura Cooper).[42] In short, Title II is appropriate legislation because the remedy for segregation is integration, not inertia.

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[42] Likewise, child-size and adult-size water fountains routinely appear in buildings; requiring accessible fountains just expands that routine design process. 2 *Leg. Hist.* 993-994 (Jade Calegory) ("Black people had to use separate drinking fountains and those of us using wheelchairs cannot even reach some drinking fountains. We get thirsty, too.").

2. Title II Is As Broad As Necessary

Petitioner objects (Br. 28) to the Disabilities Act's broad coverage and lack of either time or geographical limitations. That objection fails for two reasons. *First*, such geographical restrictions and sunset provisions exist in only a few provisions of the Voting Rights Act—such as the preclearance provisions and the requirements pertaining to election observers and examiners. The balance of the Voting Rights Act and every other piece of Section 5 legislation, including Title VII and the Equal Pay Act, apply nationwide and have no termination dates. See also *Flores*, 521 U.S. at 533 ("This is not to say, of course, that § 5 legislation requires termination dates [or] geographic restrictions."). Further, because disability discrimination admits of no particular geographic boundaries and the process of dismantling the vestiges of centuries of constitutional deprivations has only recently commenced, Congress reasonably chose not to enact such limitations in Title II.

Second, to the extent petitioner would insist on geographic or time limitations on Title II's substantive provisions, its argument cannot be reconciled with its current concession (Pet. Br. 26 n.8) that those same provisions can be enforced against the States regardless of whether Title II's abrogation is appropriate Section 5 legislation. Geographical restrictions and sunset provisions have never been constitutional prerequisites for the exercise of any other legislative power (such as the Commerce Clause, or the Necessary and Proper Clause), and there is no basis for drawing a different constitutional baseline for Section 5 legislation.

The operative question, moreover, is not whether Title II is broad, but whether it is broader than necessary. It is not. Congress found that the history of unconstitutional treatment and the risk of future discrimination found by Congress pertain to all aspects of governmental operations. It determined that only a comprehensive effort to integrate persons

with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if there were not going to be jobs and professional licenses for those who received the education. Integration in employment and licensing would not suffice if persons with disabilities lacked transportation. Integration in transportation would be insufficient if persons with disabilities could not get into the facilities to which they traveled. Ending unnecessary institutionalization would be of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreational services) were accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected problem. To do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, *supra*, at 13.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

Cases Evidencing Unconstitutional Treatment of Individuals with Disabilities:

Foucha v. *Louisiana*, 504 U.S. 176-180 (1992) (Louisiana statute, which allowed continued confinement of the mentally ill who were acquitted of crimes by reason of insanity, resulted in unconstitutional confinement in violation of the Due Process Clause, where the hospital review committee had reported no evidence of continuing mental illness and recommended conditional discharge); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447-450 (1985) (unconstitutional zoning discrimination); *Youngberg* v. *Romeo*, 457 U.S. 307, 315, 321-324 (1982) (institutionalized persons have due process "right to adequate food, shelter, clothing, and medical care," "safe conditions," and freedom from unreasonable physical restraint, as well as to "such training as may be reasonable in light of [the resident's] liberty interests in safety and freedom from unreasonable restraints"); *O'Connor* v. *Donaldson*, 422 U.S. 563, 564 (1975) (unconstitutional confinement); *Delano-Pyle* v. *Victoria County*, 302 F.3d 567, 575-576 (5th Cir. 2002) (affirming a jury verdict that included evidence of a police officer giving a sobriety test and *Miranda* warnings to a deaf plaintiff who could not understand him, and then arresting the plaintiff); *Kiman* v. *New Hampshire Dep't of Corrs.*, 301 F.3d 13, 15-16 (disabled inmate stated Eighth Amendment claim for denial of accommodations needed to protect his health and safety due to his degenerative nerve disease), reh'g en banc granted, 310 F.3d 785 (1st Cir. 2002); *Popovich* v. *Cuyahoga County Ct. of Common Pleas*, 276 F.3d 808, 816 (6th Cir.)

(en banc) (deaf parent denied communication assistance in child custody proceeding), cert. denied, 123 S. Ct. 72 (2002); *Armstrong* v. *Davis*, 275 F.3d 849, 861-863 (9th Cir. 2001) (failure to conduct parole and parole revocation proceedings in a manner that disabled inmates can understand and in which they can participate), cert. denied, 123 S. Ct 72 (2002); *Baird* v. *Rose*, 192 F.3d 462, 464-466 (4th Cir. 1999) (seventh-grader suffering from clinical depression prohibited from singing in school choir); *Key* v. *Grayson*, 179 F.3d 996, 998 (6th Cir. 1999) (deaf inmate denied access to sex offender program required as precondition for parole), cert. denied, 528 U.S. 1120 (2000); *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (failure for several months to provide means for amputee to bathe lead to infection); *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) (building permit denied for drug and alcohol treatment center "based on stereotypes and unsupported fears"); *Koehl* v. *Dalsheim*, 85 F.3d 86, 87-88 (2d Cir. 1996) (Eighth Amendment violated when inmate with serious vision problem denied glasses and treatment); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment); *Thomas S.* v. *Flaherty*, 902 F.2d 250, 253-254 (4th Cir.) (unconstitutional confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Chalk* v. *United States Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 703 (9th Cir. 1988) (certified teacher barred from teaching after diagnosis of AIDS); *LaFaut* v. *Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J.) (failure to provide paraplegic inmate with an

accessible toilet is cruel and unusual punishment); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Clark* v. *Cohen*, 794 F.2d 79, 85-87 (3d Cir.) (unconstitutional confinement), cert. denied, 479 U.S. 962 (1986); *Miranda* v. *Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (failure to provide medications for epilepsy, which caused prisoner's death, violated Eighth Amendment); *Lynch* v. *Baxley*, 744 F.2d 1452, 1459-1460 (11th Cir. 1984) (State subjected individuals awaiting civil commitment proceedings to unconstitutional conditions of confinement in county jails); *Pushkin* v. *Regents of Univ. of Colo.*, 658 F.2d 1372, 1382-83, 1387-1391 (10th Cir. 1981) (doctor with multiple sclerosis unconstitutionally denied residency out of concern about patients' reactions); *Ferrell* v. *Estelle*, 568 F.2d 1128, 1133 (5th Cir.) (deaf habeas petitioner's "rights were reduced below the constitutional minimum" because he could not understand his trial), withdrawn due to death of petitioner, 573 F.2d 867 (1978); *Gurmankin* v. *Costanzo*, 556 F.2d 184, 185-187 (3d Cir. 1977) (holding unconstitutional an irrebuttable presumption that blind teacher cannot instruct sighted students); *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1310-1312 (5th Cir. 1974) (unconstitutional conditions of confinement for the mentally ill); *McCray* v. *City of Dothan*, 169 F. Supp. 2d 1260, 1279-1280 (M.D. Ala. 2001) (police officer had "not articulated any specific facts upon which suspicion reasonably could be founded" other than "the communication gap between a deaf man and herself"); *M.H.* v. *Bristol Bd. of*

Educ., 169 F. Supp. 2d 21, 24-25 (D. Conn. 2001) (possible substantive due process violation where school employees spat water in disabled student's face and restrained him so forcibly as to result in bruising); *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 38-39, 52 (D. Me. 2001) (unconstitutional restriction on voting by those with mental disabilities); *Project Life, Inc.* v. *Glendening*, 139 F. Supp. 2d 703, 705 (D. Md. 2001) (unlawful rejection of permit for drug treatment facility based on "community prejudices"), aff'd, No. 01-1754, 2002 WL 2012545 (4th Cir. 2002); *Pathways Psychosocial* v. *Town of Leonardtown*, 133 F. Supp. 2d 772, 791-792 (D. Md. 2001) (denying summary judgment on claim that town officials violated Equal Protection Clause under *City of Cleburne* by zoning decisions that excluded a home for individuals with mental retardation) & *Pathways Psychosocial* v. *Town of Leonardtown*, 223 F. Supp. 2d 699, 704-705 (D. Md. 2002) (noting jury verdict against town and denying motion for new trial); *Salcido ex rel. Gilliland* v. *Woodbury County*, 119 F. Supp. 2d 900, 931 (N.D. Iowa 2000) (granting summary judgment for mentally ill plaintiff on claim that he was denied due process by State's denial of an appropriate institutional placement without notice or hearing); *New York* v. *County of Schoharie*, 82 F. Supp. 2d 19, 21-22 (N.D.N.Y. 2000) (inaccessible polling places); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014, 1016-1022 (D. Kan. 1999) (amputee forced to crawl around jail, resulting in injury and infection, in violation of Eighth Amendment); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 528-529 (W.D. Ark. 1998) (paraplegic litigant had to be carried up stairs to court room for all-day hearing at which he could not leave to get food or use the restroom to

empty catheter, resulting in infection; eventually had to crawl down steps to get out after everyone else left the courthouse without him); *Lewis* v. *Truitt*, 960 F. Supp. 175-178 (S.D. Ind. 1997) (Fourth Amendment prohibits use of force against an individual, whom officers know to be deaf, for not complying with officers' spoken commands); *Carty* v. *Farrelly*, 957 F. Supp. 727, 739 (D.V.I. 1997) ("The abominable treatment of the mentally ill inmates shows overwhelmingly that defendants subject inmates to dehumanizing conditions punishable under the Eighth Amendment."); *Kaufman* v. *Carter*, 952 F. Supp. 520, 523-524 (W.D. Mich. 1996) (amputee hospitalized after fall in inaccessible jail shower); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *T.E.P.* v. *Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993) (statute prohibiting and voiding marriages between individuals with AIDS); *Galloway* v. *Superior Court*, 816 F. Supp. 12, 14-15 (D.D.C. 1993) (blind individuals categorically excluded from jury service); *Nolley* v. *County of Erie*, 776 F. Supp. 715, 717-725 (W.D.N.Y. 1991) (Constitution violated where inmate with HIV was housed in the part of a prison reserved for inmates who are mentally disturbed, suicidal, or a danger to themselves, and was denied access to prison library and religious services); *Bonner* v. *Arizona Dep't of Corrs.*, 714 F. Supp. 420, 420-421 (D. Az. 1989) (deaf, mute, and vision-impaired inmate denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 405 (W.D. Pa. 1989) (decision to exclude

deaf individual from jury was "unreasonable, discriminatory and violative of Section 504 of the Rehabilitation Act"); *Doe* v. *Dolton Elem. Sch. Dist.*, 694 F. Supp. 440, 442 (N.D. Ill. 1988) (elementary student with AIDS excluded from attending regular classes or extracurricular activities); *Robertson* v. *Granite City Comm. Unit Sch. Dist.*, 684 F. Supp. 1002, 1004 (S.D. Ill. 1988) (seven-year old student with AIDS confined to a modular classroom where he was the only student); *Thomas* v. *Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 380-381 (C.D. Cal. 1986) (kindergarten student with AIDS excluded from class and forced to take home tutoring); *Garrity* v. *Gallen*, 522 F. Supp. 171, 214 (D.N.H. 1981) ("blanket discrimination against the handicapped * * * is unfortunately firmly rooted in the history of our country"); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 487, 490-493 (E.D.N.Y. 1979) (mentally retarded students excluded from public school system); *Hairston* v. *Drosnick*, 423 F. Supp. 180, 182-184 (S.D. W. Va. 1976) (school refused to admit child with spina bifida without the daily presence of her mother, even though student was of normal mental competence and capable of performing easily in a classroom situation); *Smith* v. *Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975) (government assigned paraplegic, who had a Master's degree in physiology, to menial clerical tasks based on "arbitrary and unfounded decision as to her physical capabilities"), aff'd as modified, 559 F.2d 1014 (5th Cir. 1977); *Mills* v. *Board of Educ.*, 348 F. Supp. 866, 868-870 (D.D.C. 1972) (mentally retarded students excluded from public school system); *Pennsylvania Ass'n for Retarded Children* v. *Common-*

wealth, 334 F. Supp. 1257, 1257-1259 (E.D. Pa. 1971) (mentally retarded students excluded from public school system); *State* v. *Barber*, 617 So. 2d 974, 976 (La. Ct. App. 1993) ("[T]he Constitution requires that a defendant sufficiently understand the proceedings against him to be able to assist in his own defense. Clearly, a defendant who has a severe hearing impairment, without an interpreter, cannot understand the testimony of witnesses against him so as to be able to assist in his own defense."); *State* v. *Schaim*, 600 N.E.2d 661, 671- 672 (Ohio 1992) (under the Confrontation Clause "a severely hearing-impaired defendant cannot be tried without adopting reasonable measures to accommodate his or her disability"); *Peeler* v. *State*, 750 S.W.2d 687, 690-691 (Mo. Ct. App. 1988) (constitutionally ineffective assistance of counsel in failure to request an interpreter, where the hearing-impaired defendant was "probably unable to understand what was being said at trial"); *District 27 Comm. Sch. Bd.* v. *Board of Educ.*, 502 N.Y.S.2d 325, 327-329 (N.Y. Sup. Ct. 1986) (two school boards sought to prevent attendance of any student with AIDS in any school in the city, unless all of the students at that school had AIDS); *People* v. *Rivera*, 480 N.Y.S.2d 426, 434 (N.Y. Sup. Ct. 1984) (a conviction was unconstitutionally obtained because the deaf defendant had no interpreter and did not understand his trial); *State* v. *Staples*, 437 A.2d 266, 268 (N.H. 1981) (ineffective assistance of counsel in failing to secure assistance for hearing-impaired defendant whose disability made him "unable to assist effectively in the preparation of his defense"); *In re Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply

because he is physically handicapped"); *Connecticut Inst. for the Blind* v. *Connecticut Comm'n on Human Rights & Opps.*, 405 A.2d 618, 621 (Conn. 1978) (blanket exclusion from state jobs of persons with visual impairments), modified, 355 N.Y.S.2d 185 (App. Div. 1974); *Bevan* v. *New York State Teachers' Retirement Sys.*, 345 N.Y.S.2d 921, 922-924 (Sup. Ct. 1973) (statute allowing forced retirement of teacher who became blind); *In re Adoption of Richardson*, 251 Cal. App.2d 222, 239 (Cal. 1967) (trial court "stated, in effect, that he will systematically strike any and all deaf-mute petitioners from any list of prospective adopting parents"); *State* v. *Board of Educ.*, 172 N.W. 153, 154 (Wis. 1919) (excluding a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children").

APPENDIX B

Findings of Investigations Under the Civil Rights Of Institutionalized Persons Act 42 U.S.C. 1997 et seq.

Between 1980 and the enactment of Title II of the Americans with Disabilities Act in 1990, Department of Justice investigations under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 et seq., found unconstitutional treatment of individuals with disabilities in institutions in more than twenty-five States. From 1980 until the present, unconstitutional conditions have been found in more than 200 institutions in more than thirty States throughout the country. The tables below describe some of the findings issued by the Department of Justice pursuant to 42 U.S.C. 1997b(a)(1). Copies of the complete findings letters will be provided to the Court upon request, and have been served upon counsel for petitioner and counsel for respondent Hason.

I. Investigations Prior to Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Rosewood Center	MD	1982	Failure to provide reasonable supervision and safety	Many residents sustained injuries during "low staffing periods" (p. 4). One resident left the facility unobserved and died of exposure.

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				A profoundly retarded resident drowned when staff left him unattended in a bathtub. Another died after being pushed down a flight of stairs (pp. 4-5). On another occasion, "six severely handicapped female residents * * * were allegedly raped by an outside intruder. There was only one staff person on duty to supervise the 32 residents * * * and only one security officer on duty to cover the entire Rosewood facility. While the inability of the residents to communicate apparently prevented state officials from confirming the rapes * * * several of the residents had positive tests for gonorrhea of the throat right after the incident" (p. 4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Several male patients "show[ed] the presence of venereal disease" and "nonconsensual sexual contact occurred between one resident and at least one and possibly three residents" (p. 4).
			Abuse of residents	An employee sexually abused a resident (p. 4).
			Unsanitary conditions	Facilities are deteriorating; the "stench of urine is prevalent in a number of buildings." Plumbing problems left overflowing toilets unrepaired for days; heating problems subjected patients to "sub-freezing temperature in the buildings themselves" at times (p. 5).
			Inadequate training	"Over 900 of the 1125 residents receive less than 50% of the services called for in their program plans" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
East Louisiana State Hospital	LA	1982	Inadequate medical and mental health care	pp. 2-4
Enid & Paul's Valley State Schools	OK	1983	Inadequate medical and mental health care	"Insufficient licensed physician coverage has resulted in serious harms to residents," contributing to patient deaths (p. 2-3).
			Inadequate training	Lack of training "contributes to and manifests itself in residents' aggressive and stereotypic behaviors * * * [such as] incessant disordered physical movements, headbanging, biting, hyperactivity, and assaultive behavior" (p. 5).
			Failure to provide reasonable supervision and safety	"For example, a group of 21 naked residents were observed being led to a shower area, where two staff sprayed the residents down with a large garden type hose" (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	p. 5
			Abuse of residents	Staff found "slapping, kicking, hitting, or spanking residents" while records also "reflect many instances of unexplained resident injuries" (p. 6).
			Unsanitary conditions	Lack of sanitation practices contributed to parasitic and bacterial infections requiring quarantine of entire living areas (p. 6).
Wheat Ridge Regional Center	CO	1984	Failure to provide reasonable supervision and safety	"Due to lack of staff, residents suffer neglect and numerous accidents and injuries. * * * [N]umerous residents have sustained injuries where the cause remains unknown. Resident on resident assaults are common; residents engaging in self-abusive behaviors are frequently unsupervised and

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				unattended. Residents have been found with unexplained broken bones and burns to the body. For example, one resident was found with a femur segment protruding through the skin" (p. 2). During tour, staff came upon "approximately 20 adult women being cared for by one person amid great disorder and confusion. Many of these women were partially undressed, one was urinating on the floor of the living area and several were engaging in self-abusive behavior" (p. 2).
			Inadequate medical and mental health care	"A large number of Wheat Ridge residents suffer from severe contractures of their limbs and other body deformities due to the absence of necessary physical and occupational therapy" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"One troublesome secondary effect of these immobilizing contractures due to lack of physical therapy is the dysfunctioning of the digestive system," which has apparently caused an "abnormally high percentage of Wheat Ridge residents to require pureed diets or gastroatomies for tube feeding" (p. 4).
Logansport State Hospital	IN	1984	Inadequate medical and mental health care	pp. 1-2
			Failure to provide reasonable supervision and safety	"Patients are not being adequately monitored and supervised to prevent suicidal behavior or patient-on-patient violence, to notice and correctly diagnose symptoms of serious, physical or psychiatric dysfunctions, to monitor treatment responses and drug reactions, or to determine appropriate and reasonably safe

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				modes of treatment for each patient" (pp. 2-3).
Manteno and Eglin Mental Health Centers	IL	1984	Inadequate medical and mental health care; Inadequate training; Unreasonable use of physical restraints	Lack of professional staff lead to "inappropriate uses of drugs and serious treatment errors which have resulted in physical danger to, or unnecessary physical or chemical restraint of, the involved patients" (p. 3). Patients are further "endangered by inadequate medical care relating to serious and sometimes debilitating or life-threatening drug side-effects" (p. 4).
			Failure to provide reasonable supervision and safety	"Units in the facilities are overcrowded to a point that makes it virtually impossible for staff to maintain control without regular and extensive use of physical and chemical restraints" (p. 4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unsanitary conditions	"Sanitation and maintenance in portions of the facilities are so inadequate as to present serious risks to patients of poisoning, infection, or disease" (pp. 4-5).
Northville Regional Psychiatric Hospital	MI	1984	Failure to provide reasonable supervision and safety; Abuse of residents	Large number of patient deaths under unusual circumstances, some associated with restraint practices (p. 3). A patient died after "a stranglehold was applied to him while he was being subdued. He reportedly lay on the seclusion room floor from 15-20 minutes before efforts were made to resuscitate him" (pp. 2-3). "Another patient also died due to strangulation, and his body showed signs of a beating" (p. 3). "A third patient allegedly died from injuries suffered in

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				a beating. Still another patient, who had expressed her fear for her safety to her psychologist on a Friday, died over the weekend. Her body allegedly was bruised and battered" (p. 3). Police found that another patient who had died in a seclusion cell "had contusions on his face and the back of his head" (p. 3). There have also been "numerous incidents of rape, assault and threat of assault, broken bones and bruises" (p. 3). A staff member was found to have had "sexual relations with three different patients in one night." Other patients were beaten by staff, "including one who was stripped, placed in seclusion and severely beaten by several attendants" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical and mental health care	Inadequate medical care contributed to several deaths and preventable suicides (pp. 3-4).
Fairview Training Center	OR	1985	Inadequate training	Training "is virtually non-existent" and "results in a serious level of self-injurious and aggressive behaviors" (p. 3).
			Unreasonable use of physical and chemical restraints	"[R]estraints are used at Fairview in lieu of training and for the convenience of staff," and were employed more than 2,000 times per month (p. 4).
			Failure to provide reasonable supervision and safety	Records showed "an alarmingly high number of injuries," such as 197 incidents of injuries in one month resulting from self-abuse or aggression. In one two-month period, there were 27 incidents of sexual abuse (p. 3 n.1). "[W]e observed numerous residents with open wounds, gashes, abrasions,

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				contusions, and fresh bite marks. Many other residents had deep scars and scabs from a long history of self-abuse or victimization" (p. 3). Due to inadequate supervision of residents with pica behavior (ingesting inedible objects), "[r]esidents have had to undergo surgery, sometimes on a repeated basis, to remove foreign objects or to relieve bowel and other obstructions caused by pica. Physicians at Fairview have indicated that some residents have had surgery so frequently that any more operations resulting from pica would jeopardize their lives" (p. 8).
			Inadequate medical and mental health care	Dangerous psychotropic medication practices (p. 7-8).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"Seventy percent of residents institution-wide have gum disease" (p. 8).
			Unsanitary conditions	"Many of the cottages we toured smelled of urine and waste. Sewage backup in cottage basements, up to three feet high on the walls, is permitted to remain for days. * * * [A]n August 1983 random sample of Fairview residents revealed that 35% had pinworm infection, a parasite which is spread by fecal and oral routes in unclean environments" (p. 9).
Fort Stanton Hospital & Training School	NM	1985	Inadequate medical and mental health care	Facilities' sole physician wrote institution-wide prescriptions for prescription medications and powerful psychotropic medications, authorizing their use when nursing staff believes it necessary, in contravention of

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				professional standards and creating substantial risk to patients (p. 2).
			Unreasonable use of chemical restraints	Psychotropic drugs being used to restrain patients without any physician assessment for the need for such measures (p. 2.)
			Inadequate mental health care	"Many residents are subjected to potentially dangerous" prescriptions of multiple psychotropic drugs "without any medical justification" (p. 2)
Southbury Training School	CT	1985	Failure to provide reasonable supervision and safety	Low staffing levels lead to inadequate supervision, which permitted one resident to leave the facility and die of exposure; another was able to remove and hide a large knife (p. 10). In one cottage, staff compensate for low staffing level by placing "at least one resident in

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				restraints for up to 12 hours a day due to the staff's inability to monitor his activities" (p. 10).
			Inadequate medical and mental health care	Investigation found "dangerous medication interactions and errors, and found that acute medical problems, such as fractures and infections, frequently do not receive critically necessary follow-up treatment" (p. 3). Use of psychotropic medications substantially departed from professional standards, creating substantial health risks for patients (pp. 3-6).
			Inadequate training; Unreasonable use of physical and chemical restraints	Facility's failure to provide adequate training program resulted in "a dangerous reliance on the use of both physical and chemical restraint" (p. 6).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Hinds County Detention Center	MS	1986	Inadequate medical and mental health care	County Jail was being used to house mentally ill persons awaiting civil commitment hearings or placement in a mental hospital for up to eleven days. At time of investigation, jail held 42 mentally-ill detainees (pp. 1-2). No mental health treatment was provided during period of confinement (p. 3). "Male mentally-ill detainees were confined * * * in a small cell designed to serve as the 'drunk tank.' Some of the detainees were placed in hand and leg irons" (p. 3).
Westboro State Hospital	MA	1986	Unsanitary conditions	"The smell and sight of urine and feces pervade not only the toilet areas, but ward floors and walls as well" (p. 3). "Bathrooms and showers were filthy. Living areas are

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				infested with vermin. There are consistent shortages of clean bed sheets, face cloths, towels and underwear. Open commodes with human waste in them were often found in rooms to which many patients in unclean geri-chairs are confined all day, including meal times" (p. 3). "[N]on-sterile techniques are used when changing patients' dressings and feeding tubes" (p. 3).
			Inadequate medical and mental health care	Patients' physical illnesses are often misdiagnosed as psychological problems, resulting in "increased dosages of potentially dangerous antipsychotic drugs" (p. 5). "Acutely life threatening illnesses * * * are also not detected appropriately or on a timely basis.* * *

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				[I]nappropriate and inadequate medical care preceded many of the[] deaths" reviewed during the investigation (p. 5). "Patients also frequently do not receive prescribed medications because the ward or pharmacy lacks adequate supplies" (p. 4).
			Unreasonable use of physical and chemical restraints	Facility used sedating drugs on elderly patients for no medically justifiable reason, but instead to control residents' behavior "subjecting vulnerable geriatric patients to the dangerous effects of inappropriate drug usage and overmedication" (p. 7).
			Failure to provide reasonable supervision and safety; Inadequate training	pp. 7-8

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Kalamazoo Regional Psychiatric Hospital	MI	1986	Inadequate training; Unreasonable use of physical restraints	Inadequate staffing prevents the facility from providing treatment that could "reduce or eliminate unreasonable risks to [patients'] personal safety and the undue use of bodily restraint" (p. 2).
			Inadequate medical and mental health care	Facility fails to adequately monitor efficacy and side effects of potentially dangerous drugs, creating unjustifiable risk of "deleterious side effects, tardive dyskinesia, involuntary, abnormal muscle movements, akathisia, and parkinsonism" (p. 3).
Napa State Hospital	CA	1986	Failure to provide reasonable supervision and safety; Unreasonable use of physical and chemical restraints	Severe staffing shortages "result in patient management, in lieu of treatment, through the inappropriate use of seclusion, chemical restraint, and physical restraint" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Restraint practices "pose significant hazards to the personal safety of NSH patients" (p. 4).
			Inadequate medical and mental health care; Inadequate training	Certain medication practices at facility "violated all known standards of medical practice" resulting in great danger to patient safety (p. 2). There was no monitoring of drug side effects and several patients exhibited an "antipsychotic drug-induced side effect, potentially irreversible, that may result in permanent physiological damage" (p. 3). Facility failed to provide training programs adequate to protect patient safety and avoid need for restraint and seclusion (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Broadview, Cleveland & Warrensville Developmental Centers	OH	1987	Inadequate training; Unreasonable use of chemical restraints	In the absence of adequate training programs, "staff overuse psychotropic medication to control the behavior of residents" (p. 1).
			Inadequate mental health care	p. 2
Metropolitan Developmental Center	LA	1986	Inadequate medical and mental health care	"MDC employs antipsychotic medication primarily as a means of controlling behavior without proper [medical] justification." As a result, "[n]umerous residents demonstrated serious neurological side effects from sustained exposure to high doses of antipsychotic drugs" (p. 2). Facility had no program to monitor for serious, potentially irreversible side effects of these medications (pp. 2-3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Other residents "have been exposed to an extreme risk of drug-induced toxic poisoning by the absence of preliminary and periodic drug-level testing" (p. 3).
Belle Chasse State School	LA	1986	Inadequate medical and mental health care	Administration of psychotropic drugs substantially departed from professional standards. There was no program to detect "Tardive Dyskinesia" which is "an antipsychotic drug induced side effect, potentially irreversible, that may result in permanent physiological damage" (p. 2).
Montgomery Developmental Center	OH	1987	Inadequate medical and mental health care; Failure to provide reasonable supervision and safety	pp. 2-3

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Los Lunas Hospital and Training School	NM	1988	Inadequate training; Unreasonable use of chemical restraints	"[S]traightjackets and ammonia inhalants are used as a consequence for antisocial behavior. Restrained individuals are in some cases isolated in a room with a closed door out of sight of staff. This practice, absent adequate surveillance, places severely handicapped residents at great risk of injury and is not professionally justifiable" (p. 2). "Los Lunas staff are using physical restraints, isolation and punishment * * * to control the behavior of residents in lieu of necessary training programs" (p. 2).
			Failure to provide reasonable supervision and safety	Due to lack of supervision, a woman was raped, developed peritonitis, and died (p. 3).
			Inadequate medical and mental health care	Facility provides almost no physical therapy to the large number of patients

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				with body deformities who need therapy "to prevent muscular or skeletal breakdown" (p. 3).
W.A. Howe Developmental Center	IL	1989	Inadequate training; Unreasonable use of physical and chemical restraints	"To control resident behavior, in lieu of professionally designed training programs, staff resort to chemical and physical restraints" (p. 3).
			Inadequate medical and mental health care	"Due to the lack of adequate medical supervision of patients, early signs of illness and disease go undetected and/or untreated" (p. 5).
			Failure to provide reasonable supervision and safety	Patient was dead on the floor of her room for some time before staff discovered her, after staff failed to perform scheduled room checks. Another patient strangled to death while left unsupervised in improperly-applied restraints.

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Another resident left unsupervised ran out of the front door and into traffic, where she was killed (pp. 6-7).
Great Oaks Center	MD	1990	Failure to provide reasonable supervision and safety; Inadequate training	Investigation found that inadequate supervision contributed to "an alarmingly high frequency of resident injuries" (p. 5). Inadequate training program "fails to reduce self-abusive, aggressive, and other maladaptive and inappropriate behaviors." "As a result of these problems, rocking, pacing, and aimlessly wandering residents were seen throughout the institution. Instances of self-abuse were not an uncommon sight; observed attempts to intervene appropriately were rare. Many residents were observed to have cuts, bruises and scrapes. Clearly,

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				many of the injuries may have been preventable with more effective programming and if more trained staff were available" (p. 3).
			Unreasonable use of physical and chemical restraints	"Staff resort to chemical and physical restraints to control residents' behavior, in lieu of professionally designed training programs" (p. 3).
			Inadequate mental health care	p. 4
			Abuse of residents	A number of staff had been disciplined or criminally charged for abusing patients (p. 5 n.1).
Hawaii State Hospital	HI	1990	Inadequate food, clothing and shelter	Staff at facility confirmed that there was often insufficient food; "Staff reported that patients are often wrapped in blankets and sheets due to the absence of adequate clothing"; inadequate items for basic personal hygiene (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unsanitary conditions	"[S]anitation is grossly inadequate. During a tour of [one unit] our consultants had to walk around numerous puddles of urine. * * * * Kitchen facilities exhibited signs of serious cockroach infestation and other unsanitary practices" (p. 3).
			Inadequate medical and mental health care	"[D]rug practices at HSH are seriously deficient and represent significant departures from generally accepted medical standards" (p. 3).
			Unreasonable use of physical and chemical restraints; Inadequate training	"In view of serious, chronic and facility-wide staffing shortages, HSH staff employ bodily restraints - physical restraints, seclusion, and chemical restraints - at an unjustifiably high level solely for their own convenience or in lieu of professionally designed treatment programs" (p. 5).

II. Investigations Subsequent To Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Arlington Developmental Center	VA	1991	Failure to provide reasonable supervision and safety; unsanitary conditions	"In many units, there was a pervasive smell of urine. Residents in diapers were wet; often their clothes were soaked through with urine" (p. 3).
			Inadequate medical care	"[W]e observed young children, some as young as two, whose limbs were severely contracted" from lack of physical therapy. "Many residents were left unattended in cribs, with no efforts being made to move their limbs, position them, or to provide any real physical therapy services" (p. 3). "The penis of another resident, a paraplegic with an in-dwelling Foley catheter, was eroded throughout its entire length due to inadequate care and monitoring" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Inadequate medical care contributed to deaths of five residents in past six months (p. 4).
			Abuse of residents	pp. 3-4
			Inadequate training	pp. 8-9
Northern Virginia Training Center	VA	1991	Inadequate training; Unreasonable use of physical and chemical restraints	In part because of inadequate training programs, use of restraints was pervasive: "restraint is used so frequently that it appears to be the treatment of choice rather than a technique of last resort" (p. 4).
			Inadequate medical and mental health care	"Serious medical conditions and marked functional deterioration are not comprehensively evaluated or effectively treated" due to inadequate medical system (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Boswell Retardation Center	MS	1991	Inadequate training; Unreasonable use of physical and chemical restraints	"Boswell's staff are using restraints, isolation and punishment to control the behavior of residents in lieu of necessary training programs" (p. 2).
			Inadequate mental health care	pp. 3-4
			Unsanitary conditions	p. 5
Embreeville Center	PA	1991	Inadequate medical and mental health care	Delays in emergency medical care contributed to patient death (p. 2).
			Abuse of residents	Undercover agent observed repeated instances of abuse over nine-week period (p. 3).
			Inadequate training programs	p. 2
Agnews Developmental Center	CA	1991	Unsanitary conditions	"Clients and residents smelled of urine and feces" (p. 2).
			Unreasonable use of physical and chemical restraints	Bodily restraint and medication used in lieu of training programs or adequate staff supervision (pp. 4-5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical care	Investigation found "resident after resident whose legs had lost all muscle tone and whose hip, knee and ankle joints had become permanently fixed or cemented in place in a deformed frog-leg or windswept position due to months and even years of inactivity" (p. 2). "[I]nordinate delays in diagnosing and responding to serious resident illness" placed large population of medically fragile patients at substantial risk (pp. 5-6)
			Abuse of residents	Administrators "confirmed to us that staff abuse of residents is a serious problem" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Memphis Mental Health Institute	TN	1992	Inadequate medical and mental health care	Deficiencies in the facility's medical care system contributed to two recent deaths (pp. 5-6). Lack of psychiatrists leads to serious errors in diagnosis and medication prescription (pp. 7-8).
			Unreasonable use of physical and chemical restraints	"Patients at MMHI are subjected to both an undue amount of bodily restraint and dangerous restraint practices" (p. 9). "[S]taff members are placing patients inappropriately in physical restraints simply because they are confused or disoriented." Patients are also restrained while sedated, "a substantial departure from accepted standards of psychiatric care" (pp. 9-10).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Arizona State Hospital	AZ	1993	Unreasonable use of physical and chemical restraints	Patients "are routinely put into five-point restraints (a practice where a patient is restrained on a bed and bound by the ankles, by the wrists with the arms to the side, and by a strap across the abdomen) *and* placed into a locked seclusion room" for convenience of staff. Leaving a restrained patient unsupervised creates "great risk of harm from choking and asphyxiation" (p. 2).
Jones County Jail	MS	1993	Inadequate medical and mental health care	Mentally ill inmates, and mentally ill persons detained pending civil commitment proceedings, housed in five-by-six foot steel cage, sometimes for months (p. 4).
Chicago-Read Mental Health Center	IL	1993	Inadequate mental health care; Inadequate training	pp. 1-2

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical restraints	pp. 2-3
Sonoma Developmental Center	CA	1994	Failure to provide reasonable supervision and safety	"As a result of inadequate supervision, residents have been subjected to numerous, serious, unnecessary injuries" (p. 2). In one incident, a resident drowned in a bathtub while unattended (p. 2). In another, one resident was attacked by another with a knife (p. 2).
			Inadequate training	Training programs are inadequate and lead to harm from unaddressed behaviors and to the unnecessary and unreasonable use of physical and chemical restraints (pp. 4-6).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical care	Improper feeding practices for severely disabled residents "subject them to severe risk of choking, aspiration and aspiration pneumonia" (p. 3). "The lack of physical therapists and physical therapy services has led to the development of undue contractures, muscle atrophy, inappropriate body growth, and physical degeneration" (p. 3). "The failure of staff to properly maintain [tracheostomy] tubes subjects residents to the risk of death from suffocation and presents other significant health risks, including infection" (p. 3).
Southern & Central Wisconsin Developmental Centers	WI	1994	Failure to provide reasonable supervision and safety	Inadequate supervision has led to serious resident injuries. For example, one elderly resident with condition that creates great risk

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				of falling was taken to hospital for injury caused by a fall, where hospital staff noted that she had fallen 62 times that day (p. 10).
			Inadequate medical and mental health care	While facility has over 300 residents with seizure disorders, management practices are dangerously deficient; some patients kept on medications with strong and dangerous side effects for years after they are no longer necessary; some are kept on potentially dangerous drugs even though they are not helping. For example, one patient who had been seizure free for six years, was kept on medication even though lab results showed that dosage was too low to be having any effect and even though patient appeared to be suffering from dementia as a side effect of the drug (p. 3-4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Facility's use of psychotropic medications substantially departs from professional standards, exposing patients to unnecessary risks of dangerous side effects (pp.7-9).
			Inadequate training; Unreasonable use of physical restraints	pp. 10-13
Eastern State Hospital and Hancock Geriatric Center	VA	1994	Inadequate mental health care; Inadequate training; Unreasonable use of physical and chemical restraints	pp. 1-6
Clover Bottom Developmental Center	TN	1995	Failure to provide reasonable supervision and safety	Many injuries linked to lack of supervision; "in one seven month period, a resident received injuries on twenty-six occasions," half of which required stitches (pp. 3-4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training programs	pp. 5-8
			Inadequate medical and mental health care	"Residents languish in carts and ill-fitting wheelchairs, which exacerbate or allow physical deformities to progress - in some cases to a point that the deformity may preclude a person from sitting upright in a wheelchair" (p.12).
Fircrest Residential Habilitation Center	WA	1992	Failure to provide reasonable supervision and safety	"[R]esidents suffer needless serious injuries" due to lack of supervision, including an average of "410 incidents per month for some 440 residents" (p. 1). "Numerous residents were seen with fresh wounds and lacerations, including shaved spots on heads revealing stitches and healing injuries; red marks and significant bruises; multiple scabs and scars, and large bandages or casts" (pp. 1-2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"Our consultants observed residents engaged in self-injurious behavior, having seizures, masturbating in open view - all without staff intervention of any kind" (p. 2). "[O]ne resident was found dead in the day room of a living unit; the resident had been dead for up to three hours before her body was discovered by staff" (p. 2). Dangerous positioning and feeding practices risk the lives of many residents (p. 2).
			Inadequate training	"Due to a lack of human interaction and care, residents have developed significant stereotypic, maladaptive or anti-social behaviors" including "headbanging, eating foreign objects and pulling hair, to waving arms, flicking fingers and other self-

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				stimulatory activities" (p. 1). "Much of the anti-social, maladaptive behavior, injuries and use of restraints is attributable, in significant part, to the lack of * * * training programs" (p. 5).
			Unreasonable use of physical and chemical restraints	Physical restraints, including "staff incapacitating residents by holding them down involuntarily on the floor or elsewhere for a period of 'enforced relaxation'" were pervasively "used as punishment, for the convenience of staff and in lieu of training programs" (p. 4-5).
Forrest County Jail	MS	1993	Inadequate mental health care	"There are no mental health services available at the jail and the holding cells into which disturbed or mentally-ill * * * prisoners are placed pose a direct threat to their health and safety" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"During the course of our tour of the jail, our consultants observed a severely mentally ill inmate, clad only in an undershirt, housed in the general population" where he had been waiting for several weeks for a transfer to a mental health facility. "He had allegedly eaten some glass and was prone to defecate on the floor of the cell" (pp. 2-3).
Nat T. Winston Developmental Center	TN	1995	Inadequate training; Unreasonable use of physical and chemical restraints	"NTWDC, because of the ineffectiveness of its behavioral programs, relies on physical and chemical restraints to control residents' behavior" (p. 3). Lack of training programs and supervision contribute to high incidence of injuries, including "multiple bites, lacerations, broken bones, bruises and abrasions. One individual was

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				injured 25 times * * * in an eight-month period. * * * Several residents were found attempting to cut themselves with knives or razorblades" (p. 4).
			Inadequate medical and mental health care	pp. 4-5
			Unsanitary conditions	"Sanitary conditions were very poor at the food facility"; "Mold and mildew were prevalent throughout the refrigerators and coolers" because of plumbing leaks (pp. 5-6).
Greene Valley Developmental Center	TN	1995	Inadequate medical and mental health care	"Due to an inadequate medical care delivery system * * * residents are subjected to needless fractures, recurrent aspiration, preventable weight loss, recurring seizures, avoidable injuries, and other direct threats to their health" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Psychiatrists prescribing dangerous combinations of drugs "absent any rational justification in violation of medical standards" (p. 3).
			Failure to provide reasonable supervision and safety	Due to lack of supervision, residents "are repeatedly 'found with blood' on them from injuries that occur outside of staff supervision. On other occasions, residents' severe injuries are discovered only during bathing or at bedtime" (p. 5). "[O]ne eleven year old boy apparently lost the sight in one eye from repeated headslapping which resulted in a detached retina. Other residents were noted with swollen, disfigured features resulting from years of self-injury. Still others had permanent scars from

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				continual self-mutilation of their faces and arms" (p. 6).
			Inadequate training	Many residents' "destructive behaviors remain unaddressed" by training programs. "For example, one resident had large scratches on her face that had been self-inflicted; our consultant psychologist was informed that there was no program to modify or eliminate this unsafe behavior." The same was true of another patient who repeatedly reopened a wound on his face and one who had a history of pica for almost 20 years (p. 7).
Northern Virginia Mental Health Institute	VA	1995	Inadequate medical and mental health care	"[P]sychiatric care is grossly inadequate" and "poses direct threats to the health and safety of patients" (p. 3). "A county hospital is located only a few hundred yards

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				[away], yet there have been a number of well-publicized deaths which are linked to substantial delays in providing adequate medical care" (p. 4). "[O]ne patient died partly because of a toxic buildup of antidepressants in her body. Another patient died from meningitis after a psychiatrist requested that she be seen by an internist who failed to appear to assess her life-threatening condition" (p. 4).
			Unreasonable use of physical and chemical restraints	"Due to inadequate staffing, NVMHI is unable to provide one-on-one monitoring for many residents who are suicidal or are in restraints or seclusion and require such close supervision. Patients have been injured while being restrained and are then left unattended by medical personnel" (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Failure to provide reasonable supervision and safety	"[T]he lack of supervision and care is so grave that patients have been subjected to severe harm, including death" (p. 5).
Northern Virginia Mental Health Institute	VA	1996	Failure to provide reasonable supervision and safety	Problems with supervision persist: in the past year, there were 70 incidents of patients escaping from the facility, and an average of 27 incidents of patient self-injury and another 17 incidents of patient-on-patient violence each month (p. 7). Patients repeatedly injured themselves even when "supposedly under careful supervision." "One patient committed approximately 12 such acts of self-injury while on 'special observation' status." "One patient somehow managed to obtain a knife while in the seclusion room" (p. 7).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training	In some cases, "staff have resorted to calling the police and having patients arrested rather than addressing the underlying psychological issues" (p. 8).
Central State Hospital	VA	1997	Failure to provide reasonable supervision and safety	Lack of staffing and failure to supervise patients leads to repeated incidents of preventable injury and suicide attempts (pp. 3-5). One patient supposedly under 24-hour surveillance was found with 42 bruises over his body from unwitnessed incidents (p. 4).
			Inadequate medical and mental health care	pp. 5-7, 9-11

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	Facility's use of restraints substantially departs from professional standards (pp. 7-9). Patient died after being left in five-point restraint on bed as punishment; her psychiatrist had warned facility staff not to restrain her because of seizure risk. Nonetheless, the "patient had spent over 300 hours of the last two months of her life in restraints" (p. 8).
Landmark Learning Center	FL	1996	Failure to provide reasonable supervision and safety	pp. 3-4
			Inadequate training and mental health care	pp. 4-10
Harold Jordan Rehab. Center	TN	1996	Inadequate training and mental health care	pp. 3-4

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Los Angeles County Jail	CA	1997	Inadequate mental health care	Jail system housing approximately 1,700 mentally ill inmates provides virtually no treatment to most inmates other than medication (p. 8). Jail exacerbates many inmates' illness by placing them in solitary confinement for 23 hours or more per day (p. 12).
			Failure to provide reasonable supervision and safety	Jail places many mentally ill inmates in general population, but requires them to wear uniforms that designate them as mentally ill. As a result, many inmates suffered from beatings and sexual assaults (pp. 14, 17).
Centro de Reeducation para Adultos	PR	1997	Unsanitary conditions/ inadequate shelter	"Many of the buildings are dilapidated, decaying, and lack adequate plumbing and lighting." At one facility, "the showers do not work, the faucets do not work, and the toilets do not flush

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				properly. In order to bathe the clients, staff dump water from water tanks into large movable garbage cans from which the staff manually extract water using smaller buckets to pour it on the residents." Lack of water means that staff cannot wash hands after changing some patients' diapers (p. 3).
			Inadequate training and mental health care; Failure to provide reasonable supervision and safety	Investigators found patient "sitting on the floor * * * moaning to himself. We noticed a stream of blood trickling down his helmet. * * * * When the nurse removed his helmet, we discovered that [the patient's] head had been severely damaged due to years of self-abuse and head banging. [He] had butted and rammed his head into walls and post corners so often that he had pushed back completely his hair and skin on the front half of his

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				head." Nonetheless, "the Commonwealth has failed to provide [the patient] with professional psychological or behavioral services." Investigation found many other such individuals not receiving adequate care (p. 6). p. 4
			Unreasonable use of physical and chemical restraints	"Restraints are prevalent at many of the institutions * * * and are related lack of behavioral programming, training, and professional mental health intervention. * * * * [S]taff use a bed sheet to tie [a client's] waist and torso to a bench and to one of the iron bars at the facility to keep her from walking around the building and engaging in aggressive, maladaptive behaviors such as

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				biting and hitting other clients. Staff tie [another client] up in four-point restraints to her bed for the entire time she is menstruating" (p. 7)
Center for Integral Services	PR	1997	Failure to provide reasonable supervision and safety	"On our tour of CIS, we generally found a dangerous environment for the clients. We noticed many CIS residents with fresh injuries, including lacerations and bruises, as well as historical remnants of past injuries suffered at CIS, such as disfiguring scars. Many clients had suffered facial injuries or severe injuries on the back of their heads with resulting deep scars and hair loss" (p. 3). Parents of clients showed pictures of "son with a very swollen, bulbous, purple and black eye. The father told us that his son has suffered a host

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				of other injuries at CIS including a broken nose, a severe knee injury * * * and various head injuries, some requiring sutures." Another picture showed a client with a black eye, "a bloody left eye socket, bloody swollen lips, and a face marked with fresh lacerations. The mother reported that her son has also suffered a fractured arm, numerous lacerations, bites, broken teeth" and "is now limited in the use of his hands to one index finger and thumb on each hand" (p. 4).
			Inadequate food, shelter and sanitation	"[T]he facility runs out of food monthly" and "is in a state of disrepair." "Residents have to sleep on beds with old, worn mattresses that are dirty and often wet." Toilets do not flush. As a result, "virtually all of the toilets on the men's side had urine and/or

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				feces in them, producing a health hazard and an unpleasant, malodorous environment" (pp. 5-6). "Staff admitted to us that they routinely bathe the male clients by lining them up naked and hosing them down in groups * * * with a garden hose" (pp. 6-7).
			Abuse of residents	Facility administrator acknowledged problems with protecting clients from staff abuse and stated that "one CIS staff member had recently been convicted for sodomizing a client" (p. 3).
			Unreasonable use of physical and chemical restraints	"CIS frequently uses restraints as a substitute for meaningful activity during the day or for appropriate programs to address maladaptive behaviors * * * to control residents

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				they routinely use mechanical restraints, such as leather cuff belts (which are tied to the heavy metal beds around the limbs of the clients), restraint vests and straight jackets, and restraint nets" (p. 8).
			Inadequate medical and mental health care	Facility "routinely runs out of certain critical drugs" such as anti-convulsant medications for epileptic patients, who suffered repeated untreated seizures as a result (pp. 5, 10). "Most of the residents are put on psychotropic medication simply to control their behaviors without appropriate psychiatric assessments, diagnoses, treatment and monitoring" (p. 9).
			Inadequate training programs	pp. 7-9

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Hammond Developmental Center and Pinecrest Developmental Center	LA	1997	Failure to provide reasonable supervision and safety	Client went for weeks with an undetected fractured shoulder, even though obviously in pain and bruised (p. 6).
			Abuse of residents	Four staff members recently indicted for abusing residents, many other incidents of abuse documented by facility (pp. 4-5, 15-16).
			Unreasonable use of physical and chemical restraints	"A staff member left a client in full mechanical restraints unattended for hours in a room with a known aggressor" while staff watched television (p. 5). Failure to provide adequate training programs leads to some patients being in restraints virtually non-stop (p. 12). Failure to monitor clients in restraints led to injuries (p. 12-13).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training	As a result of insufficient training programs, "residents' aberrant behaviors continue unabated, often get worse, and lead frequently to other destructive behaviors" (p. 10). Staff in one unit withheld food from clients if they misbehaved (p. 10).
			Inadequate medical and mental health care	pp. 13-15
Holly Center	MD	1998	Failure to provide reasonable supervision and safety; Inadequate medical care	Improper feeding techniques for severely disabled residents contributed to a constant rate of hospitalization and several deaths from choking and severe respiratory problems (pp. 3-5). Systemic inadequacies in medical care contributed to the recent death of a severely handicapped and retarded resident (pp. 7-8).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training	pp. 8-13
Davies County Detention Center	KY	1998	Inadequate mental health care	Jail provides no mental health services. "During our tour, we observed several acutely mentally ill individuals at the main jail, obviously in need of psychiatric evaluation and treatment, being left for days at a time in 'observation' - *i.e.*, in a cell by themselves. One inmate was observed singing for hours on end, and eating his own feces" (p. 11). As a result of inadequate mental health and suicide prevention system, a 15-year-old boy killed himself (p. 12).
New Castle Developmental Center	IN	1998	Failure to provide reasonable supervision and safety; Inadequate training	"Injuries are pervasive throughout the campus. With a census of 164 individuals, New Castle averaged over 1,000 resident injuries/incidents on a monthly basis";

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				over a four-month period, "88 percent of New Castle residents sustained injuries; 82 percent of the residents were injured more than one time during this period" (pp. 2-3). In a single month, one resident was assaulted 20 times and another was assaulted 19 times (p. 3). "Other injuries are unwitnessed by staff, including bone fractures, bloodied noses and body bruises" (p. 3). "[W]e witnessed instances in which residents engaged in aggressive and self-injurious behaviors (including head slapping, hand biting, eye gouging and table banging) without appropriate and timely staff intervention (p. 4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical and mental health care	While half of residents have epilepsy, facility's seizure management practices dangerously depart from accepted medical practices, increasing risk of liver and permanent brain damage (pp. 5-6). Insufficient levels of nursing staff lead to failures to identify and treat serious medical problems (pp. 6-7).
Georgia Juvenile Facilities	GA	1998	Inadequate mental health care	Inadequate mental health care provided throughout State's juvenile detention facilities and training schools (pp. 9-11, 19-22). Many mentally ill youth "end up locked in security units where they spend large portions of their days isolated in small rooms with few activities. In these units, and elsewhere, they are often restrained, hit, shackled, put in restraint chairs for hours, and sprayed with [pepper

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				spray] by staff who lack the training and resources to respond appropriately to the manifestations of mental illness" (p. 20).
Western State Hospital	VA	1999	Inadequate medical and mental health care	Facility fails to identify and address mental health needs, leading to inadequate treatment and risk of harm. In one case, patient identified as suicidal was given no treatment to address suicidal urges and subsequently hanged himself in his room (pp. 3-4). Physicians are not permitted to prescribe some medically-indicated drugs for budget reasons (pp. 5-6). Inadequate medical care contributed to several recent deaths (p. 8).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	Facility uses excessive and dangerous restraint techniques (p. 7).
			Failure to provide reasonable supervision and safety; Inadequate training	Combination of inadequate staffing and training for patients results in high level of violence and injuries. Within one 90-day period, the facility of 370 patients "recorded 169 altercations, 81 instances of self-injurious behavior, and 128 falls" as well as 8 suicide attempts and 13 escapes. In the recent past, one patient committed suicide and was dead for an hour before being discovered (p. 9).
Rainier School & Frances Haddon Morgan Center	WA	1999	Unreasonable use of physical and chemical restraints	"In 1998, Rainier logged many thousands of hours of restraint use, without demonstrating that less restrictive interventions were tried or that underlying behavioral support plans and services

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				were adequate." For example, the facility's response to patients attempting to eat inedible objects (pica) or digging at their eyes or rectums was to place patients in nearly constant restraints: one patient with pica behavior spent 2,000 hours in a restraint suit over a six-month period; another averaged 600 hours per month for pica and rectal digging; another averaged 22 hours per day in the suit for rectal digging (pp. 2-3).
			Failure to provide reasonable supervision and safety; Inadequate training; Inadequate medical and mental health care	"Without the necessary specialized treatment, * * * residents have suffered serious harm. Residents * * * have blinded themselves from chronic behaviors, such as eye poking and head banging, that the facilities have not addressed in accordance with accepted

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				professional standards" (p. 7). Numerous incidents of unaddressed, dangerous behaviors, such as pica, head-banging, and eye-poking (pp. 7-8). In one facility, "approximately 20 percent of all Morgan residents were admitted to the emergency room or hospital, some on more than one occasion, for treatment of injuries" in a one-year period; during same year residents in another facility "suffered approximately 77 lacerations requiring sutures (32 involving the head), 37 bone fractures, 8 dislocated shoulders, and 2 incidents of finger amputation" (p. 10).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Clark County Detention Center	NV	1999	Inadequate mental health care	Jail failed adequately to identify mentally ill inmates and provide appropriate treatment, resulting in serious harm and suicides (pp. 5-6).

APPENDIX C

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SELECTED PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12101 *et seq.*

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards

and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title II, Part A, of The Americans With Disabilities Act

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 2410(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

* * * * *

Title II, Part B, of The Americans With Disabilities Act

§ 12141. Definitions

As used in this subpart:

(1) Demand responsive system

The term "demand responsive system" means any system of providing designated public transportation which is not a fixed route system.

(2) Designated public transportation

The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 12161 of this title)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) Fixed route system

The term "fixed route system" means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) Operates

The term "operates", as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) Public school transportation

The term "public school transportation" means transportation by schoolbus vehicles of schoolchildren, per-

sonnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) Secretary

The term "Secretary" means the Secretary of Transportation.

§ 12142. Public entities operating fixed route systems

(a) Purchase and lease of new vehicles

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following July 26, 1990, and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) Purchase and lease of used vehicles

Subject to subsection (c)(1) of this section, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system to purchase or lease, after the 30th day following July 26, 1990, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Remanufactured vehicles

(1) General rule

Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system—

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following July 26, 1990; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended;

unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Exception for historic vehicles

(A) General rule

If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to

meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

(B) Vehicles of historic character defined by regulations

For purposes of this paragraph and section 12148(b) of this title, a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

§ 12143. Paratransit as a complement to fixed route service

(a) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) Issuance of regulations

Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

(c) Required contents of regulations

(1) Eligible recipients of service

The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section—

(A)(i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(B) to one other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (B), accompanying

the individual with a disability provided that space for these additional individuals is available on the paratransit vehicle carrying the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) Service area

The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) Service criteria

Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) Undue financial burden limitation

The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to pro-

vide such services to the extent that providing such services would not impose such a burden.

(5) Additional services

The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) Public participation

The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) Plans

The regulations issued under this section shall require that each public entity which operates a fixed route system—

(A) within 18 months after July 26, 1990, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation services which meets the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) Provision of services by others

The regulations issued under this section shall—

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

(B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) Other provisions

The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this section.

(d) Review of plan

(1) General rule

The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

(2) Disapproval

If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) Modification of disapproved plan

Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secre-

tary, and commence implementation of, such modified plan.

(e) "Discrimination" defined

As used in subsection (a) of this section, the term "discrimination" includes—

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7) of this section;

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d)(3) of this section;

(3) submission to the Secretary of a modified plan under subsection (d)(3) of this section which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) Statutory construction

Nothing in this section shall be construed as preventing a public entity—

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

(3) from providing such services to individuals in addition to those individuals to whom such services are required to be provided by this section.

§ 12144. Public entity operating a demand responsive system

If a public entity operates a demand responsive system, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for such entity to purchase or lease a new vehicle for use on such system, for which a solicitation is made after the 30th day following July 26, 1990, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.

§ 12145. Temporary relief where lifts are unavailable

(a) Granting

With respect to the purchase of new buses, a public entity may apply for, and the Secretary may temporarily relieve such public entity from the obligation under section 12142(a) or 12144 of this title to purchase new buses that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates to the satisfaction of the Secretary—

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufac-

turer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(b) Duration and notice to Congress

Any relief granted under subsection (a) of this section shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.

(c) Fraudulent application

If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) of this section was fraudulently applied for, the Secretary shall—

(1) cancel such relief if such relief is still in effect; and

(2) take such other action as the Secretary considers appropriate.

§ 12146. New facilities

For purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

§ 12147. Alterations of existing facilities

(a) General rule

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the

facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. Where the public entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Special rule for stations

(1) General rule

For purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Rapid rail and light rail key stations

(A) Accessibility

Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on July 26, 1990.

(B) Extension for extraordinarily expensive structural changes

The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following July 26, 1990, at least 2/3 of such key stations must be readily accessible to and usable by individuals with disabilities.

(3) Plans and milestones

The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection—

(A) that reflects consultation with individuals with disabilities affected by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

§ 12148. Public transportation programs and activities in existing facilities and one car per train rule

(a) Public transportation programs and activities in existing facilities

(1) In general

With respect to existing facilities used in the provision of designated public transportation services, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(2) Exception

Paragraph (1) shall not require a public entity to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 12147(a) of this title (relating to alterations) or section 12147(b) of this title (relating to key stations).

(3) Utilization

Paragraph (1) shall not require a public entity to which paragraph (2) applies, to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities.

(b) One car per train rule

(1) General rule

Subject to paragraph (2), with respect to 2 or more vehicles operated as a train by a light or rapid rail system,

for purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity to fail to have at least 1 vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section.

(2) Historic trains

In order to comply with paragraph (1) with respect to the remanufacture of a vehicle of historic character which is to be used on a segment of a light or rapid rail system which is included on the National Register of Historic Places, if making such vehicle readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity which operates such system only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of section 12142(c)(1) of this title and which do not significantly alter the historic character of such vehicle.

§ 12149. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title).

(b) Standards

The regulations issued under this section and section 12143 of this title shall include standards applicable to facilities and vehicles covered by this part. The standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers

Compliance Board in accordance with section 12204 of this title.

§ 12150. Interim accessibility requirements

If final regulations have not been issued pursuant to section 12149 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 12146 and 12147 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

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§ 12161. Definitions

As used in this subpart:

(1) Commuter authority

The term "commuter authority" has the meaning given such term in section 502(8) of Title 45.

(2) Commuter rail transportation

The term "commuter rail transportation" has the meaning given the term "commuter rail passenger transportation" in section 502(9) of Title 45.

(3) Intercity rail transportation

The term "intercity rail transportation" means transportation provided by the National Railroad Passenger Corporation.

(4) Rail passenger car

The term "rail passenger car" means, with respect to intercity rail transportation, single-level and bi-level coach cars, single-level and bi-level dining cars, single-level and bi-level sleeping cars, single-level and bi-level lounge cars, and food service cars.

(5) Responsible person

The term "responsible person" means—

(A) in the case of a station more than 50 percent of which is owned by a public entity, such public entity;

(B) in the case of a station more than 50 percent of which is owned by a private party, the persons providing intercity or commuter rail transportation to such station, as allocated on an equitable basis by regulation by the Secretary of Transportation; and

(C) in a case where no party owns more than 50 percent of a station, the persons providing intercity or commuter rail transportation to such station and the owners of the station, other than private party owners, as allocated on an equitable basis by regulation by the Secretary of Transportation.

(6) Station

The term "station" means the portion of a property located appurtenant to a right-of-way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but such term does not include flag stops.

§ 12162. Intercity and commuter rail actions considered discriminatory

(a) Intercity rail transportation

(1) One car per train rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides intercity rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New intercity cars

(A) General rule

Except as otherwise provided in this subsection with respect to individuals who use wheelchairs, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a

person to purchase or lease any new rail passenger cars for use in intercity rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Special rule for single-level passenger coaches for individuals who use wheelchairs

Single-level passenger coaches shall be required to—

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, and a space to fold and store such passenger's wheelchair; and

(iv) have a restroom usable by an individual who uses a wheelchair,

only to the extent provided in paragraph (3).

(C) Special rule for single-level dining cars for individuals who use wheelchairs

Single-level dining cars shall not be required to—

(i) be able to be entered from the station platform by an individual who uses a wheelchair; or

(ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

(D) Special rule for bi-level dining cars for individuals who use wheelchairs

Bi-level dining cars shall not be required to—

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or

(iv) have a restroom usable by an individual who uses a wheelchair.

(3) Accessibility of single-level coaches

(A) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides intercity rail transportation to fail to have on each train which includes one or more single-level rail passenger coaches—

(i) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one-half of the number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one-half of the number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 5 years after July 26, 1990; and

(ii) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than the total number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 10 years after July 26, 1990.

(B) Location

Spaces required by subparagraph (A) shall be located in single-level rail passenger coaches or food service cars.

(C) Limitation

Of the number of spaces required on a train by subparagraph (A), not more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs shall be located in any one coach or food service car.

(D) Other accessibility features

Single-level rail passenger coaches and food service cars on which the spaces required by subparagraph (A) are located shall have a restroom usable by an individual who uses a wheelchair and shall be able to

be entered from the station platform by an individual who uses a wheelchair.

(4) Food service

(A) Single-level dining cars

On any train in which a single-level dining car is used to provide food service—

(i) if such single-level dining car was purchased after July 26, 1990, table service in such car shall be provided to a passenger who uses a wheelchair if—

(I) the car adjacent to the end of the dining car through which a wheelchair may enter is itself accessible to a wheelchair;

(II) such passenger can exit to the platform from the car such passenger occupies, move down the platform, and enter the adjacent accessible car described in subclause (I) without the necessity of the train being moved within the station; and

(III) space to park and secure a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to remain in a wheelchair), or space to store and fold a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to transfer to a dining car seat); and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a dining car described in clause (i) through which an individual who uses a wheelchair may enter.

(B) Bi-level dining cars

On any train in which a bi-level dining car is used to provide food service—

(i) if such train includes a bi-level lounge car purchased after July 26, 1990, table service in such lounge car shall be provided to individuals who use wheelchairs and to other passengers; and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

(b) Commuter rail transportation

(1) One car per train rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides commuter rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New commuter rail cars

(A) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to purchase or lease any new rail passenger cars for use in commuter rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Accessibility

For purposes of section 12132 of this title and section 794 of Title 29, a requirement that a rail passenger car used in commuter rail transportation be accessible to or readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, shall not be construed to require—

(i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger;

(ii) space to fold and store a wheelchair; or

(iii) a seat to which a passenger who uses a wheelchair can transfer.

(c) Used rail cars

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29, for a person to purchase or lease a used rail passenger car for use in intercity or commuter rail transportation, unless such person makes demonstrated good faith efforts to purchase or lease a

used rail car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(d) Remanufactured rail cars

(1) Remanufacturing

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to remanufacture a rail passenger car for use in intercity or commuter rail transportation so as to extend its usable life for 10 years or more, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) Purchase or lease

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to purchase or lease a remanufactured rail passenger car for use in intercity or commuter rail transportation unless such car was remanufactured in accordance with paragraph (1).

(e) Stations

(1) New stations

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secre-

tary of Transportation in regulations issued under section 12164 of this title.

(2) Existing stations

(A) Failure to make readily accessible

(i) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a responsible person to fail to make existing stations in the intercity rail transportation system, and existing key stations in commuter rail transportation systems, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(ii) Period for compliance

(I) Intercity rail

All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after July 26, 1990.

(II) Commuter rail

Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after July 26, 1990, except that the time limit may be extended by the Secretary of

Transportation up to 20 years after July 26, 1990, in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(iii) Designation of key stations

Each commuter authority shall designate the key stations in its commuter rail transportation system, in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such station serves as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing.

(iv) Plans and milestones

The Secretary of Transportation shall require the appropriate person to develop a plan for carrying out this subparagraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this subparagraph.

(B) Requirement when making alterations

(i) General rule

It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, with respect to alterations of an existing station or part thereof in the intercity or commuter rail transportation systems that affect or could affect the usability of the station or part

thereof, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portions of the station are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.

(ii) Alterations to a primary function area

It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, with respect to alterations that affect or could affect the usability of or access to an area of the station containing a primary function, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(C) Required cooperation

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for an owner, or person in control, of a station governed by subparagraph (A) or (B) to fail to provide reasonable cooperation to a responsible person with

respect to such station in that responsible person's efforts to comply with such subparagraph. An owner, or person in control, of a station shall be liable to a responsible person for any failure to provide reasonable cooperation as required by this subparagraph. Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this chapter.

§ 12163. Conformance of accessibility standards

Accessibility standards included in regulations issued under this subpart shall be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board under section 12204(a) of this title.

§ 12164. Regulations

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart.

§ 12165. Interim accessibility requirements

(a) Stations

If final regulations have not been issued pursuant to section 12164 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that stations be readily accessible to and usable by persons with disabili-

ties as required under section 12162(e) of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(b) Rail passenger cars

If final regulations have not been issued pursuant to section 12164 of this title, a person shall be considered to have complied with the requirements of section 12162(a) through (d) of this title that a rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such cars, to the extent that such laws and regulations are not inconsistent with this subpart and are in effect at the time such design is substantially completed.

Title IV of The Americans With Disabilities Act

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[2] I and III of this chapter.

(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[3] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

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[2] So in original. Probably should be "subchapters".

[3] So in original. Probably should be "in a".

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible

Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general

The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register

With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites

With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

§ 12206. Technical assistance

(c) Plan for assistance

(1) In general

Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan

The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5 (commonly known as the Administrative Procedure Act).

(b) Agency and public assistance

The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a) of this section, including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) Implementation

(1) Rendering assistance

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility.

(2) Implementation of subchapters

(A) Subchapter I

The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a) of this section, for subchapter I of this chapter.

(B) Subchapter II

(i) Part A

The Attorney General shall implement such plan for assistance for part A of subchapter II of this chapter.

(ii) Part B

The Secretary of Transportation shall implement such plan for assistance for part B subchapter II of this chapter.

(C) Subchapter III

The Attorney General, in coordination with Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for subchapter III of this chapter, except for section 12184 of this title, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) Title IV

The Chairman of the Federal Communications Commission, in coordinate with the Attorney General, shall implement such plan for assistance for title IV.

(3) Technical assistance manuals

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this chapter no later than six months after applica-

ble final regulations are published under subchapters I, II, and III of this chapter and title IV.

(d) Grants and contracts

(1) In general

Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit or any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this chapter. Contracts may be awarded to entities organized for profit, but such entities may not be the recipients or[1] grants described in this paragraph.

(2) Dissemination of information

Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this chapter and to provide information and technical assistance about techniques for effective compliance with this chapter.

(e) Failure to receive assistance

An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter because of any failure to receive technical assistance under this section,

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[1] So in original. Probably should be "of".

including any failure in the development or dissemination of any technical assistance manual authorized by this section.

§ 12207. Federal wilderness areas

(a) Study

The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 *et seq.*).

(b) Submission of report

Not later than 1 year after July 26, 1990, the National Council on Disability shall submit the report required under subsection (a) of this section to Congress.

(c) Specific wilderness access

(1) In general

Congress reaffirms that nothing in the Wilderness Act [16 U.S.C. 1131 et seq.] is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) "Wheelchair" defined

For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-

impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

§ 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

§ 12209. Instrumentalities of the Congress

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) In general

The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities

The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

(3) Report to Congress

The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentality

For purposes of this section, the term "instrumentality of the Congress" means the following:,[1] the General Accounting Office, the Government Printing Office, and the Library of Congress,.[1]

(5) Enforcement of employment rights

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(6) Enforcement of rights to public services and accommodations

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 or section 12182 or 12183 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

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1 So in original. The comma probably should not appear.

(7) Construction

Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

§ 12210. Illegal use of drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in

this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or other provisions of Federal law.

(2) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

§ 12211. Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not

impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

§ 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of this chapter and such action shall not affect the enforceability of the remaining provisions of this chapter.

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IN THE

Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

v.

MICHAEL J. HASON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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N.D. Cent. Code § 14-02.4-15 (2003) 18
N.D. Cent. Code § 48-02-19 (1991) 10, 13
N.H. Rev. Stat. Ann. § 155:39-b (1990) 9
N.H. Rev. Stat. Ann. § 354-A:2 (2003) 18
N.H. Rev. Stat. Ann. § 354-A:3 (1990) 13, 14
N.J. Stat. Ann. § 10:5-5 (1990) 13
N.M. Stat. Ann. § 28-1-2(A) (1990) 8
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N.Y. Exec. Law § 296(2)(a) (1990) 10
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Neb. Rev. Stat. § 20-129 (1990) 8
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43 Pa. Cons. Stat. Ann. § 962(c.2) (2003) 17

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S.C. Code Ann. § 43-33-520 (1990) 13
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Wyo. Stat. Ann. § 35-13-203 (1990) 8

REGULATIONS:

28 C.F.R. § 35.130(b)(7) 15

OTHER AUTHORITIES:

Colker, Ruth, & Milani, Adam, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002) 6, 10, 18

Del. Op. Atty. Gen. No. 00-IB09 (May 30, 2000), 2000 WL 1092966 (Del. A.G.) 9

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IN THE

Supreme Court Of The United States

No. 02-479

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

v.

MICHAEL J. HASON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus National Association of Protection and Advocacy Systems (NAPAS), founded in 1981, is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands), P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

settings. In fiscal year 2001, P&As served well over 60,000 persons with disabilities through individual case representation and systemic advocacy.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act ("ADA").

Because of its national P&A membership and familiarity with the protections afforded by each state to persons with disabilities, NAPAS has firsthand knowledge of the state laws and how they operate in practice. NAPAS is thus uniquely suited to assist the Court in understanding the state law backdrop against which Congress enacted the ADA as well as the status of that state law today.

INTRODUCTION AND SUMMARY

Title II of the ADA proscribes discrimination in the provision of public "services, programs, or activities." 42 U.S.C. § 12132. After an exhaustive investigation, Congress determined that such national legislation was required, expressly finding that discrimination in "the access to public services" persists in significant measure because persons with disabilities "have often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(3), (4). As a result, Congress concluded that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis." *Id.* § 12101(a)(9).

In the face of these express statutory findings, petitioner nevertheless suggests in its opening brief that the legislative history of the ADA demonstrates that when it enacted the ADA, Congress believed that state law was generally sufficient to safeguard against the pervasive discrimination against people with disabilities with respect to public services. Pet. Br. 10 (the legislative record "tends to

demonstrate a congressional awareness that States were ahead of Congress in enacting prophylactic and remedial legislation for persons with disabilities") and 24 ("Congress was aware that, in many cases, the States were ahead of the Federal Government in protecting the rights of persons with disabilities."), citing *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 368 n.5 (2001).

Petitioner's error in these assertions is three-fold. First, petitioner ignores the clear legislative findings quoted above specifically referencing the pervasive discrimination in "public services." Such legislative findings, included in the statutory text, must be given greater weight than isolated statements selected from the vast legislative history. See, *e.g.*, *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 91 (2000) (noting that an examination of the legislative record is not necessary in all circumstances and striking down the ADEA in part because there were no statutory findings regarding state action).[2]

Second, the weight of legislative history is in line with the findings and contrary to petitioner's position. For example, the Fifty State Governors' Committees, on whose reports Congress relied, concluded that "existing State laws do not adequately counter such acts of discrimination." S. Rep. No. 101-116, 18 (1989). And petitioner's suggestion regarding the adequacy of state law conflicts sharply with the conclusions of the Senate Report that "State laws are

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[2] The legislative findings set forth in the ADA specifically identifying access to "public services" also distinguishes this case from this Court's recent decision in *Bd. of Tr. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 370–71 (2001), in which the lack of findings relating to public employment caused the Court to examine the legislative history more carefully with respect to Title I of the ADA. See also *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 212 (1997) ("We are not at liberty to substitute our judgment for the reasonable conclusion of a legislative body."); *Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989) ("Congress is not required to build a record in the legislative history to defend its policy choices.").

inadequate to address the pervasive problems of discrimination that people with disabilities are facing." *Id.*

Third, putting aside the legislative history, an examination of the status of state discrimination law when the ADA was enacted demonstrates that Congress's express findings were correct. State law in 1990 provided inconsistent and inadequate coverage and remedies, seriously limiting the ability of many persons with disabilities to gain redress for discrimination. Although some states had enacted general legislation in some way addressing discrimination against people with disabilities, that state legislation did not, by and large, adequately cover such discrimination by the states in the provision of services—the specific form of discrimination prohibited by Title II.

It is this third point that we address in detail in this brief. We demonstrate below that when the ADA was enacted, only one state had explicit statutory protection comparable to Title II of the ADA in the areas we discuss below. Thus, contrary to the suggestions of petitioner, Title II was not unnecessary legislation enacted over a landscape of protective state law. It was, in fact, enacted to respond to the inadequate protection provided by the incomplete and porous patchwork of state laws.

First, half of the states simply failed to provide statutory protection against disability discrimination in the provision of state services. Although some of those states did have statutes prohibiting disability discrimination with respect to employment or public accommodations, they did not extend coverage to the state "services, programs, and activities" covered by Title II of the ADA.

Second, looking at the states that did proscribe disability discrimination in the provision of state services, the coverage was less than complete. For example, many of those states failed to provide coverage to all members of the class of persons that Congress expressly found had been "subjected to

a history of purposeful unequal treatment." 42 U.S.C. § 12101(a)(7). Over twenty states limited their coverage to persons with physical disabilities, thus leaving people with mental impairments with no legal recourse against such discrimination whatsoever. Several other states did not protect persons who are discriminated against, not because they have some disability, but because they have a record of some disability or are perceived as having such a disability.

In addition, the vast majority of the states did not have statutes that expressly required reasonable modifications to their services to assure that qualified citizens with disabilities could participate in and benefit from those services. Finally, where state laws did address disability discrimination in state services, they often did so in ways that denied potential claimants an effective remedy. Many state remedial schemes lacked adequate provisions for recovery of damages or attorney's fees, rendering them ineffective as both a remedy and a deterrent to continuing discrimination.

In short, when Title II of the ADA was enacted, only half of the states provided statutory protection with respect to discrimination in state services, and only one state provided statutory protections equivalent to those contained in Title II in each of the areas discussed above. Thus, in light of Congress's finding that such discrimination persisted, Title II was an appropriate response to the failure of state laws to remedy or deter such discrimination. As national legislation, Title II ensures that persons with disabilities have consistent protection against discrimination in the provision of state services, regardless of the state in which they reside.

We also demonstrate in Part II below that state law remains inadequate today. Absent Title II, enforcement of the rights of people with disabilities to access public services would be greatly diminished. Thus, not only was Congress acting to remedy significant gaps in state anti-discrimination laws when it enacted the ADA, but the continuing vitality of Title

II of the ADA is essential to secure the guarantee of equal protection and due process for all persons with disabilities.[3]

ARGUMENT

I. When the ADA Was Enacted, Individual State Laws Failed To Protect Persons with Disabilities Against Discrimination in the Provision of State Services.

A. Coverage of State Services

Title II of the ADA prohibits public entities from discriminating on the basis of disability in the provision of their services. Specifically, Section 202 provides that:

> "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Since 1990, plaintiffs have relied on Title II to challenge discriminatory acts involving core governmental functions, including voting,[4] institutionalization,[5] access to state courts,[6]

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[3] In this brief, we rely heavily on the work of Professors Ruth Colker and Adam Milani in a recent article in the Alabama Law Review. Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002). This article surveys current state law in detail and concludes that absent the protections of Title II of the ADA, the protection available to persons with disabilities would be greatly diminished in a majority of states. In an appendix to the article, the authors attach a comprehensive state-by-state summary of state disability law as it relates to Title II of the ADA.

[4] See, *e.g.*, *New York* v. *County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) (failure to ensure that polling places were accessible to people with disabilities violated Title II); *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (D.Me. 2001) (overbroad exclusion of individuals with mental illness from voting violated Title II).

[5] See, *e.g.*, *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

education,[7] prisoners' rights,[8] law enforcement,[9] and public assistance programs.[10] By ensuring that individuals with disabilities have access to these types of basic public services, programs and activities, Title II of the ADA has enabled them to participate as equal citizens in the most fundamental aspects of our society. Before the ADA was enacted, many state laws failed to address the exclusion of people with disabilities from these and other important government services—and their consequent isolation from public life and inability to participate fully in the rights and privileges of citizenship. Had Congress not enacted Title II, many people with disabilities would have remained second-class citizens, unable to cast a ballot, attend school or state universities, or receive public assistance benefits.

Consistent with Congress's findings regarding the inadequacy of state law, when the ADA was enacted, only half of the states provided statutory protection against disability discrimination in the provision of such fundamental public services and programs. In the states which did offer such protection, the statutes often took the form of "public accommodation" laws that could be interpreted to cover state

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[6] See, *e.g.*, *Popovich* v. *Cuyahoga County Ct. Com. Pl.*, 276 F.3d 808 (6th Cir. 2002) (deaf plaintiff sued Ohio to obtain sign-language interpreter in child custody case), *cert. denied*, 123 S. Ct. 72 (2002).

[7] See, *e.g.*, *Wong* v. *Regents of Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999) (disabled student sued to require university to make reasonable modification).

[8] See, *e.g.*, *Pa. Dep't of Corr.* v. *Yesky*, 524 U.S. 206 (1998) (Title II applies to state correctional facilities).

[9] See, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181 (2002) (plaintiff sued police department for injuries sustained while being transported in a van not equipped to hold a wheelchair).

[10] See, *e.g.*, *Lovell* v. *Chandler*, 303 F.3d 1039 (9th Cir. 2002) (exclusion of persons with disabilities from state health insurance program violated Title II).

services. For example, New Mexico had a statute forbidding any person, specifically including the state, "in any public accommodation" from discriminating in "offering or refusing to offer its services, facilities, accommodations or goods to any individual because of . . . physical or mental handicap." N.M. Stat. Ann. §§ 28-1-7(f) and 28-1-2(A) (1990).[11] Thus, we assume that a claimant could sue the state if it were discriminating against that individual with respect state services (or programs or activities) because of his or her disability.

Half of the states, however, had no such statutory protection. First, the public accommodation statute in three states—Arizona, Kentucky, and Tennessee—did not cover persons with disability at all.[12] In these states, the statutes covered discrimination on the basis of sex, national origin and the like but left persons with disabilities without protection.

Second, in thirteen states, the general public accommodation statute either did not cover or was not enforceable against the state. For example, in Mississippi, the only penalty for a violation of the statute was a misdemeanor which would not be enforceable against the state. See Miss. Code Ann. § 43-6-11 (1990).[13] In other states, the types of public accommodations covered by the statute did not

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[11] In this brief, all citations to statutes are taken from the online databases on either Westlaw or Lexis. The citations to historical statutes were taken from the databases on those services for the year identified. Citations to current law are taken from the current statute databases and identified as 2003.

[12] See Ariz. Rev. Stat. § 41-1441 (1990); Ky. Rev. Stat. Ann. § 344.120 (1990); Tenn. Code Ann. § 4-21-501 (1990).

[13] See also Ala. Code § 21-7-5 (1990) (only penalty a misdemeanor); Ark. Code Ann. § 20-14-302 (1990) (same); Ga. Code Ann. § 30-3-6 (1990) (same); Idaho Code § 39-3210 (1990) (same); Ind. Code Ann. § 35-46-2-1 (1990) (same); Neb. Rev. Stat. § 20-129 (1990) (same); Utah Code Ann. § 26-30-4 (1990) (same); Wyo. Stat. Ann. § 35-13-203 (1990) (same).

expressly include state-run accommodations such as public libraries or other buildings or facilities. See, *e.g.*, Cal. Civ. Code § 51 (1990) (prohibiting discrimination on the basis of physical disability by "business establishments") and *Black* v. *Department of Mental Health*, 100 Cal. Rptr. 2d 39, 42 n.4 (Cal. Ct. App. 2000) (declining to address the lower court's ruling that the state was not covered by the act).[14]

Finally, nineteen states had statutes prohibiting disability discrimination with respect to general public accommodations, but unlike New Mexico, these statutes did not cover "services." For example, Washington had a statute prohibiting any person from committing an act which "results in any distinction, restriction, or discrimination . . . in any place of public resort, accommodation, assemblage, or amusement" regardless of disability. Wash. Rev. Code Ann. § 49.60.215 (1990). As in New Mexico, the term "person" was defined to include the state. See Wash. Rev. Code Ann. § 49.60.040 (1990). But the statute did not prohibit such discrimination in the provision of services or programs or activities. To the contrary, in *Fell* v. *Spokane Transit Authority*, 911 P.2d 1319, 1329 (Wash. 1996), the court held that the statute could not be interpreted to cover transportation services offered by the city. The Court held that:

> "What must be very clear . . . is that the [state] statutory mandate to provide access to places of public accommodation is not a mandate to provide services. While entitlement to services may be in the ADA, the

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[14] See also Del. Code Ann. tit. 6, § 4501 (1990) and Del. Op. Atty. Gen. No. 00-IB09 (May 30, 2000), 2000 WL 1092966 (Del. A.G.) (state is not covered by statute); N.H. Rev. Stat. Ann. § 155:39-b (1990) (providing a narrow definition of "public accommodation" that does not expressly include the state); Wis. Stat. Ann. § 101.22(1m)(bp) (1990) (providing definition of public accommodation that does not expressly include the state).

> Legislature has not enacted a counterpart to the ADA in Washington creating such entitlements." *Id.*[15]

Thus, in Washington, state buildings that accommodate the public may be covered by the statute, but none of the services provided by the state would be.

Of the nineteen states that failed to cover discrimination in the provision of services, ten also failed to cover the state (and hence have already been counted in the thirteen states listed above).[16] Nine additional states, including Washington, had statutes that did cover the state, at least with respect to its buildings and facilities, but failed to cover services.[17]

Adding up the three states that had statutes that did not cover disability discrimination, the thirteen states that had statutes that did not cover the state, and the nine additional states that did cover the state but did not cover services, there were twenty-five states that failed to provide statutory protection against disability discrimination with respect to state services.

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[15] See Coker and Milani, 55 Ala. L. Rev. at 1093–94, for discussion of case and similar case in Ohio.

[16] See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); Utah Code Ann. § 26-30-1 (1990); Wis. Stat. Ann. § 101.22(9)(a) (1990); Wyo. Stat. § 35-13-201 (1990).

[17] Fla. Stat. Ann. § 413.08(1) (1990), see also Fla. Stat. Ann. § 393.13 (1990) (covering services discrimination with respect to narrowly defined population of "developmentally disabled"); Me. Rev. Stat. Ann. tit. 5, § 4551 (1990); Md. Ann. Code art. 49B, § 7 (1990); N.Y. Exec. Law § 296(2)(a) (1990); Ohio Rev. Code Ann. § 4112.02 (2002) (historical text unavailable), see also *Davis* v. *Flexman*, 109 F. Supp. 2d 776 (S.D. Ohio 1999) (holding that statute applied to facilities and not services); N.D. Cent. Code § 48-02-19 (see historical notes in 1991 database); Tex. Hum. Res. Code Ann. § 121.001 (1990); Vt. Stat. Ann. tit. 9, § 4502 (1990).

B. Limitations in Coverage of State Services

Having established that only twenty-five states had any form of statutory protection against disability discrimination in the provision of state services, we now turn to the various limitations in that protection as compared to what Congress deemed necessary in Title II the ADA. As we demonstrate below, many of the statutes failed to cover critical populations of persons with disabilities. They also by and large failed to require that states make reasonable modifications in such services to ensure that persons with disabilities would not be denied the benefits of such services. Finally, we show that in many of the states, the remedies were inadequate to address the problem of discrimination effectively.

1. Definition of Persons with Disabilities

A critical step in prohibiting discrimination on the basis of disability is to define the protected class with sufficient breadth. Persons with both physical and mental impairments have long suffered discrimination in this country. So too have persons who have a record of impairment or who are regarded as having such an impairment.

Congress recognized that all such persons need protection against discrimination when it enacted the Rehabilitation Act of 1973 and the 1978 amendments thereto. See 29 U.S.C. § 794 and historical notes. Moreover, by 1990, this Court had similarly recognized the importance of these elements. In *City of Cleburne*, this Court noted that persons with mental disabilities are often the subject of discrimination on the basis of "negative attitudes and fear." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985) (holding that the city council's denial of a special use permit under a zoning ordinance that prevented a home for persons with mental impairments was unconstitutionally discriminatory under the Fourteenth Amendment). Indeed, the holding in *Cleburne* itself demonstrates the occurrence of

unconstitutional discrimination in the provision of public services against persons with mental impairments.

It is also clear that invidious discrimination can be aimed at persons who, though not currently disabled, have a record of disability or are regarded as having such a disability. Indeed, in *School Board* v. *Arline*, 480 U.S. 273, 284 (1987), this Court recognized that by including both having a "record of" disability and being "regarded as" having a disability in the definition of disability in the Rehabilitation Act, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."

In light of this history, it is not surprising that Congress incorporated these elements into the definition of "disability" in the ADA. Thus, Section 3(2) of the ADA defines "disability" to mean:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Looking at the landscape of state law in 1990, however, several states failed to incorporate these critical categories. For example, Nevada and Kansas each had statutes that prohibited discrimination in the provision of services, but their coverage of persons with disabilities was limited to those with "physical and visual" impairments (Nev. Rev. Stat. Ann. § 651.070 (see historical notes in 1991 database) or those with a "physical handicap" (Kan. Stat. Ann. § 44-1009(c)(3) (1990)). Similarly, South Carolina prohibited discrimination against persons because of "handicap" but

specifically excluded persons with "mental illness." See S.C. Code Ann. §§ 43-33-520, 43-33-560 (1990).[18]

In addition, twelve of the states that prohibited disability discrimination in the provision of public services failed to include in the protected class persons who are "regarded as" having an impairment and persons who have a "record of" an impairment.[19] Desiring to put an end to discrimination based

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[18] The exclusion of persons with mental impairments was also pervasive in states, including California, which did not cover discrimination in the provision of state services as listed in Part A above. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Civ. Code § 51 (1990) (only covering physical disability) and Cal. Gov't Code § 12944 (1990) (specifically relating to licensing boards but only covering "medical conditions or physical handicap" and not "mental handicap"); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08(1) (1990) and Fla. Stat. Ann. § 393.13 (1990) (covering narrowly defined population of developmentally disabled); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.D. Cent. Code § 48-02-19 (see historical notes in 1991 database); N.H. Rev. Stat. Ann. § 354-A:3 (1990) (excluding illness from the definition of "physical or mental disability"); Utah Code Ann. § 26-29-2 (1990); Wis. Stat. Ann. § 101.22(1m)(b) (1990) (covers narrowly defined population of developmentally disabled); Wyo. Stat. Ann. § 35-13-201(a) (1990).

[19] See Conn. Gen. Stat. Ann. § 46a-64 (1990); Iowa Code Ann. § 601A.2 (1990); Kan. Stat. Ann. § 44-1002 (1990); Mass. Gen. Laws ch. 272, § 98 (see historical notes in current statute); Mich. Comp. Laws § 37.1103 (1990); Mo. Rev. Stat. § 213.010 (1990) (definitions do not include "record of"); Mont. Code Ann. § 49-2-101 (1990) (according to 1991 statute annotation, until 1991 amendment neither group included in definitions); N.J. Stat. Ann. § 10:5-5 (1990); Nev. Rev. Stat. Ann. § 651.050 (1990) (according to 1989 Westlaw database and annotations to current statute, neither group was included in this statute or any others relating to persons with disabilities); 43 Pa. Cons. Stat. Ann. § 954 (1990) (neither group included until this statute was amended in 1991); S.C. Code Ann. § 43-33-560 (1990); Va. Code Ann. § 51.5-3 (1990) (definitions do not include "regarded as").

Another eighteen states that did not have protection with respect to the state services also failed to include these elements in their definition of

on such "accumulated myths and fears," Congress drafted the ADA to include protection for both groups. See 42 U.S.C. § 12102(2).

2. Reasonable Modification

Another significant problem with many state statutes was their failure to require that the states make even simple modifications to their services and programs to avoid excluding persons with disabilities from participating in or enjoying the benefits of such services and programs. In passing the ADA, Congress recognized that such a requirement was essential to ensure discrimination could not persist under false rationales. See, *e.g.*, *US Airways, Inc.* v. *Barnett*, 122 S. Ct. 1516, 1522–23 (2002) (recognizing that the ADA "seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life").

Thus, Title II of the ADA specifies that "qualified individual[s] with disability[ies]" shall not be "excluded from participation in or be denied the benefits of" such services by reason of their disabilities. 42 U.S.C. § 12132. In turn, a "qualified individual with a disability" is defined to be a person who,

> "with or without *reasonable modifications* to rules, policies, or practices, the removal of architectural,

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disabled with respect to discrimination in public accommodations. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Gov't Code § 12926 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-4126 (1990); Ind. Code Ann. § 22-9-1-3(r) (1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (1990); Md. Ann. Code art. 49B, § 5 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); Tex. Hum. Res. Code Ann. § 121.002(4) (1990); Utah Code Ann. § 26-29-2 (1990); Wash. Rev. Code Ann. § 70.84.010 (1990); Wis. Stat. Ann. § 101.13 (1990); Wyo. Stat. Ann. § 35-13-201(a) (1990).

> communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (emphasis added).

The Attorney General's regulations issued pursuant to Section 204(a), 42 U.S.C. § 12134(a), interpret this definition to require a public entity to

> "make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (emphasis added).

Thus, Title II requires that public entities, including states, make "reasonable modifications" to their policies, practices, and procedures in order to insure that persons with disabilities can participate in and benefit from public services.

Nevertheless, when Congress enacted Title II, only four of the twenty-five states that had a statutory prohibition against disability discrimination in state services incorporated an express obligation to make such modifications with respect to such services.[20]

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[20] Minn. Stat. Ann. §§ 363.03(3)(2), (4)(1) (see historical notes in 1991 database), Mo. Ann. Stat. § 213.010(8) (1990), N.C. Gen. Stat. § 168A-3(10)(b) (1990); S.D. Codified Laws § 20-13-23.7 (1990) Four other states had statutes incorporating the "programs and activities" language from the Rehabilitation Act. See Haw. Rev. Stat. Ann. § 368-1.5(a) (1990); La. Rev. Stat. Ann. § 46:2254 (1990); Mass. Gen. Laws Ann. Const. Amend. CXIV (see historical notes in 1991 database); Va. Code Ann. § 51.5-40 (1990). We note that courts in these states, like this court, could interpret such language to require reasonable modification, so the lack of a specific statutory requirement may be less troubling in those

3. Remedies

The final issue we address is that of remedies. In passing Title II, Congress recognized that without an effective remedial scheme, Title II would have little impact on the pervasive discrimination existing at the time. Thus, Title II of the ADA incorporates by reference the enforcement provisions under Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a (which themselves are based on the remedies applicable to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*). See 42 U.S.C. § 12133. Under this scheme, plaintiffs may obtain injunctive relief, damages, and attorney's fees.

The remedies available under state law in 1990 were substantially more limited. First, taking the same twenty-five states that did provide statutory protection against disability discrimination in the provision of state services, six failed to provide for damages as a remedy for violations by the state (even to remedy and deter intentional discrimination)[21] and another four significantly limited such damages.[22]

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states. See *Alexander* v. *Choate*, 469 U.S. 287, 300 (1985) (construing statute to mean that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones").

[21] Colo. Rev. Stat. Ann. §§ 24-34-306, -605 (1990) (no compensatory relief); Conn. Gen. Stat. Ann. § 46a-64(c) (1990) (no private right of action); N.M. Stat. Ann. §§ 28-7-3 (1990) (injunctive relief only); 28-7-5 (1990) (misdemeanor only); N.C. Gen. Stat. § 168A-11(b) (1990) (no damages); Oklahoma (no statute allowing damages for discrimination based on disability); S.D. Codified Laws § 20-13-23 (1990).

[22] Kan. Stat. Ann. § 44-1005(k) (1990) (limited compensatory damages to $2,000); Nev. Rev. Stat. Ann. § 651.090(1) (see historical notes in the 1991 database) (Section 41.035 imposes a $50,000 limit on tort damages against state and state employees); S.C. Code Ann. § 43-33-540 (1990) (limits actual damages to $5,000); W. Va. Code Ann. §§ 5-11-13(c); 5-11-10 (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding

Second, of the twenty-five states that covered services six did not allow successful plaintiffs to obtain attorney's fees for claims involving services or facilities.[23] Without the availability of such an award, enforcement is substantially limited, especially where the relief sought does not otherwise entail damages.

* * *

Having examined each of these limitations, only Minnesota had statutory protections in the areas we have discussed at least as strong as those Congress deemed adequate to ensure that persons with disabilities be able to enjoy the benefits of critical state services, programs and activities. And while some states' statutory protections may have been "ahead" of the federal government in 1990, it can hardly be said that Congress enacted the ADA, and Title II in particular, against a backdrop of sufficient or effective state laws.

II. Invalidating Title II of the ADA Would Severely Undermine the Protections Currently Afforded to Persons with Disabilities in a Majority of States.

Unfortunately, since the enactment of the ADA, only a few states have improved their disability statutes with respect to state services. As a recent study in the University of Alabama Law Review concludes, "Our study confirms . . . [that] only a minority of states actually have statutory protection against disability discrimination . . . similar to that found in ADA

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could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

[23] See Colo. Rev. Stat. Ann. §§ 24-34-605; 24-34-306 (1990); Conn. Gen. Stat. Ann. §§ 46a-97 to 46a-125 (1990) (no private right of action for discrimination against persons with disabilities); Kan. Stat. Ann. § 44-1005 (1990); Pennsylvania (section in current law allowing attorney's fees, see 43 Pa. Cons. Stat. Ann. § 962(c.2) (2003), was added in 1991); R.I. Gen. Laws § 42-87-4 (1990); S.D. Codified Laws § 20-13-24 (1990).

Title II."[24] Thus, since the enactment of the ADA, only four states—Kentucky, Maine, North Dakota and Vermont—have added statutes that prohibit the state from discriminating in the provision of its services,[25] and only two states—Kentucky and South Dakota—have revised their remedial provisions to allow damages against the state for violations of such statutes.[26] Similarly, while eight states broadened their definition of disability to cover at least some persons with mental impairments,[27] and ten states have done so to include those with a record of impairment or who are regarded as having an impairment,[28] over twenty states still have definitions of disability more limited than the ADA.

Thus, the need for Title II of the ADA is as real now as it was in 1990. There can be no assurance that the state legislatures which have not acted since 1990 would act now to rectify the deficiencies in their laws if this Court were to strike down Title II as applied to the states. Yet

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[24] Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1113 (2002).

[25] Ky. Rev. Stat. Ann. §§ 344.120; 344.130 (2003); Me. Rev. Stat. Ann. tit. 5, §§ 4592, 4553 (2003); N.D. Cent. Code §§ 14-02.4-14, 14-02.4-15 (2003); Vt. Stat. Ann. tit. 9, §§ 4502(c); 4501(1) (2003).

[26] Ky. Rev. Stat. Ann. § 344.450 (2003); S.D. Codified Laws § 20-13-35.1 (2003).

[27] Ariz. Rev. Stat. Ann. § 41-1492 (2003); Cal. Gov't Code § 12926 (2003); Del. Code Ann. tit. 6, § 4502 (2003); Kan. Stat. Ann. § 44-1002 (2003); Ky. Rev. Stat. Ann. § 344.010 (2003); Nev. Rev. Stat. Ann. § 651.050 (2003); N.H. Rev. Stat. Ann. § 354-A:2 (2003); Wis. Stat. Ann. § 106.52(c) (2003).

[28] Ariz. Rev. Stat. Ann. § 41-1492 (2003); Cal. Gov't Code § 12926 (2003); Kan. Stat. Ann. § 44-1002 (2003); Ky. Rev. Stat. Ann. § 344.010 (2003); Me. Rev. Stat. Ann. tit. 5, § 4553 (2003); Mo. Rev. Stat. § 213.010 (2003); Mont. Code Ann. § 49-2-101 (2003); Nev. Rev. Stat. Ann. § 651.050 (2003); 43 Pa. Cons. Stat. Ann. § 954 (2003); Wis. Stat. Ann. § 106.52(c) (2003).

discrimination against persons with disabilities will not simply go away. Accordingly, the comprehensive coverage and remedies available under Title II the ADA are vital to the protection of persons with disabilities and many persons with disabilities will be harmed if these protections are taken away.

CONCLUSION

For the reasons set forth in the Brief for Respondent and above, this Court should affirm the judgment of the court of appeals.

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In the

Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

v.

MICHAEL J. HASON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MATTHEW KIMAN AND JOSEPH POPOVICH AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF THE AMICI[1]

Amici Matthew Kiman and Joseph Popovich are plaintiffs in pending cases brought, *inter alia*, under Title II of the Americans with Disabilities Act of 1990. Kiman, who has amyotrophic lateral sclerosis (ALS), was denied various accommodations to his medical and sanitary needs while incarcerated in a New Hampshire state prison. See *Kiman* v. *New Hampshire Dept. of Corrections*, 301 F.3d 13, 15-16, *vacated on grant of rehearing en banc*, 310 F.3d 785 (1st Cir. 2002). The First Circuit has stayed proceedings in Kiman's appeal pending this Court's resolution of this case. See *Kiman* v. *New Hampshire Dept. of Corrections*, 311 F.3d 439 (1st Cir. 2002). Popovich, who has a hearing impairment, was denied hearing assistance during judicial proceedings concerning the custody of his daughter. See *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 811 (6th Cir.), cert. denied, 123 S. Ct. 72 (2002). Popovich's case is currently pending before the District Court for the Northern District of Ohio. See *id.* at 818 (remanding for new trial). The New Hampshire prison system's treatment of Kiman, and the Ohio court system's treatment of Popovich, implicate constitutional considerations that are quite distinct from those implicated by California's denial of a medical license to respondent Michael Hason. Kiman and Popovich are concerned that Hason's case not become a vehicle for this Court to speak broadly on Congress's authority to enact Title II as it applies to the wide range of cases that are very different from Hason's.

SUMMARY OF ARGUMENT

This case presents the question whether Congress properly exercised its authority to enforce the Fourteenth Amendment when it adopted Title II of the Americans with Disabilities Act of 1990. Petitioner directly challenges the constitutionality of 42 U.S.C. § 12202, which abrogates state sovereign immunity in suits brought under the ADA. The case thus implicates "the gravest and most

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[1] Written consents from all parties have been filed with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

delicate duty that this Court is called on to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)—the duty to decide whether Congress, a coordinate branch of government, has acted within its powers. We agree with respondent that Congress did not exceed its authority here, and we urge this Court to affirm the judgment of the court of appeals. We are concerned, however, that a number of lower courts that have addressed the constitutionality of Section 12202's abrogation of state sovereign immunity have proceeded in a manner that is inconsistent with fundamental principles of judicial restraint. By focusing on ADA Title II as a whole, and asking whether Congress had a sufficient Fourteenth Amendment basis for adopting that statute in *all* of its applications, these courts have imposed on plaintiffs the intolerable burden of defending the constitutionality of the statutory abrogation as it might apply to fact patterns far removed from the facts of their own particular cases. Such a facial analysis disregards this Court's precedents, as well as Congress's expressed intent to "invoke the sweep of congressional authority" in enacting the ADA. 42 U.S.C. § 12101(b)(4). In deciding this case, the Court should reaffirm its longstanding rule that a statute's constitutionality must be evaluated on an as-applied basis, and it should reject the approach of those courts that have considered the constitutionality of Title II as a whole.

This Court has repeatedly emphasized that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The Court has applied that principle not just in cases where Congress was alleged to have violated protected individual rights, but also in cases (like the present one) in which Congress was alleged to have exceeded its affirmative power to enforce the Civil War Amendments. See *United States* v. *Raines*, 362 U.S. 17, 20-26 (1960); *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-107 (1971). There is nothing in the "congruence and proportionality" test enunciated in *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997), this Court's body of cases applying *City of Boerne*, or the language of Title II that justifies a departure from this longstanding rule here. To the contrary, this Court's previous application of *City of Boerne*

to the ADA, in *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), employed an as-applied analysis that was very much in line with the *Salerno* rule.

Applying that rule here, Congress's abrogation of state sovereign immunity in suits under Title II cannot be deemed invalid on its face. For there plainly exist numerous circumstances under which application of the statute is congruent and proportional to actual or threatened violations of the Fourteenth Amendment. In a wide range of areas of state government—including incarceration and other involuntary institutionalization, elections, and the judicial process—Congress acted against the backdrop of widespread constitutional violations by states, violations that were frequently confirmed by judicial rulings, and it adopted rules that go only slightly if at all beyond what the Constitution itself requires. Even if, as some lower courts have held, some of Title II's requirements lack congruence and proportionality as applied to *other* areas of state government, there is no justification for striking the statute's abrogation of state sovereign immunity on its face.

Because Title II is, on its face, proper Section 5 legislation, the relevant question before this Court is whether application of Title II to the facts of this case satisfies the congruence and proportionality test. Respondent's *pro se* complaint can fairly be construed as alleging that petitioner rejected his license application solely out of prejudice and without any rational basis. Because such conduct violates the Equal Protection Clause, see *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985), the application of Title II to that conduct is congruent and proportional to an actual violation of the Fourteenth Amendment.

ARGUMENT

I. This Court's Proper Focus Is On The Application Of ADA Title II To The Parties And Circumstances Of This Case

Article III of the United States Constitution gives federal courts authority to review the constitutionality of an Act of Congress "only when the justification for some direct injury

suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy." *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). As this Court has long made clear, that authority is "little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." *Ibid.* Applying these principles, the only proper issue before the Court is whether the ADA's abrogation section, 42 U.S.C. § 12202, is valid "as applied to *this* party in the circumstances of *this* case." *City of Chicago* v. *Morales*, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting).

Notwithstanding these basic limitations on federal-court jurisdiction, a number of lower courts addressing the abrogation of state sovereign immunity in Title II cases have proceeded as if their duty was to consider the constitutionality of the statute as a whole and in the abstract. See, *e.g.*, *Dare* v. *California*, 191 F.3d 1167, 1175-1176 (9th Cir. 1999) (upholding Title II "as a whole" as proper Section 5 legislation and refusing to entertain state's as-applied challenge to the statute's constitutionality because "Fourteenth Amendment analysis" of a statute should not be conducted "in a piecemeal manner"), cert. denied, 531 U.S. 1190 (2001). Evaluating Title II globally in the broad sweep of its applications, rather than as applied to the specific facts of the particular cases before them, a number of these courts have struck down the statute's abrogation of state sovereign immunity on its face. See, *e.g.*, *Wessel* v. *Glendening*, 306 F.3d 203, 207-208 (4th Cir. 2002) (where plaintiff's claim "arises directly under Title II," rather than under a specific regulation implementing the statute, Section 5 analysis must consider Title II as a whole); *Thompson* v. *Colorado*, 278 F.3d 1020, 1028 n.4 (10th Cir. 2001) (holding that it is appropriate to "conduct the abrogation analysis by considering Title II in its entirety" and concluding that the statute as a whole exceeds Congress's Section 5 power), cert. denied, 122 S. Ct. 1960 (2002). As petitioner (Pet. Br. 15)—but

not its *amicus*[2]—appears to recognize, such a facial analysis disregards this Court's well-established jurisprudence.

A. A Facial Challenge Is Generally Improper Unless "No Set Of Circumstances" Exists Under Which The Statute Would Be Valid

The Court has repeatedly emphasized that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *E.g., Salerno*, 481 U.S. at 745. This rule rests on fundamental notions of judicial restraint. Where a statute is constitutional as applied to the facts before the court, it would be inconsistent with the judicial role to conjure up other possible sets of facts as applied to which the statute might be unconstitutional. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *Raines*, 362 U.S. at 22. And where the court concludes that an application of a particular statute is unconstitutional, judicial restraint even more strongly counsels that the court proceed cautiously. "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary." *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

The Court applied these principles in *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995). There, the Court held that a federal statute that barred any "Member, officer, or employee" of the federal government from receiving honoraria violated the First Amendment. *Id.* at 459 (quoting statutory text). But the Court limited its holding "to the parties before the Court," who included only relatively low-level executive branch employees, *id.* at 477-478. Because "the government conceivably might advance a different justification for an honoraria

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[2] See Va. Br. 9-13 (citing *Wessel* and *Thompson* and arguing that Title II as a whole exceeds Congress's Section 5 power).

ban limited to more senior officials," the Court left the ban intact as it applied to those officials. *Id.* at 478.[3]

The Court has not limited *Salerno*'s principle of judicial restraint to cases like *Salerno* and *National Treasury Employees Union*, in which Congress was alleged to have violated protected individual rights. The Court has applied that principle as well in cases like the present one, in which Congress was alleged to have exceeded the scope of its affirmative power to enforce the Civil War Amendments. *Raines*, *supra*, is a classic example. That case involved the constitutionality of a provision of the Civil Rights Act of 1957, which authorized the United States to bring an injunctive action against "any person" who interfered with protected voting rights. 42 U.S.C. § 1971(c). The federal government had brought such an action against state election officials, who argued that the statute exceeded Congress's authority to enforce the Fifteenth Amendment. A three-judge district court agreed. That court read the statute's "any person" language as "allow[ing] the United States to enjoin purely private action designed to deprive citizens of the right to vote on account of race or color." *Raines*, 362 U.S. at 20. And it concluded that the statute, as so construed, extended beyond Congress's power to enforce the Fifteenth Amendment because it transgressed that Amendment's limitation to discriminatory *state* action. See *ibid.*

This Court reversed. The district court's facial analysis, this Court concluded, disregarded two basic limitations on judicial review of the constitutionality of statutes: "'one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* at 21 (quoting *Liverpool, N.Y., & Phila. S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39

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[3] Four Justices would have gone even further and limited the holding of unconstitutionality not just to the *parties* before the Court but also to the *type of conduct* before the Court—government employees' receipt of honoraria "for speech without nexus to Government employment." *Id.* at 485-489 (O'Connor, J., concurring in the judgment in part and dissenting in part); accord *id.* at 501-503 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting).

(1885)). Accordingly, the district court's proper focus should have been on the particular application of the Civil Rights Act of 1957 involved in the case before it: "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." *Id.* at 24-25. Because the complaint alleged conduct Congress clearly had power to prohibit under the Fifteenth Amendment—racial discrimination by state officials—the district court should "have gone no further and should have upheld the Act as applied in the present action." *Id.* at 26.

The Court applied a similar analysis in *Griffin*, *supra*. There, the Court interpreted 42 U.S.C. § 1985(3)[4] as applying to wholly private conspiracies, so long as they are motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus," and they "aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Griffin*, 403 U.S. at 102. In deciding whether the statute as so construed was a proper exercise of congressional authority, the Court recognized that such a broad prohibition of private conspiracies might have applications that went beyond Congress's power to enforce the Civil War Amendments. See *id.* at 104. But it noted that cases like *Raines* had "long since firmly rejected" the "rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad." *Ibid.* Instead, the Court concluded, the proper inquiry "need go only to identifying a source of congressional power to reach the private conspiracy alleged by the complaint *in this case*." *Ibid.* (emphasis added). Because Congress clearly had authority under the Thirteenth and Fourteenth Amendments to reach the conduct alleged in the case before it (a private conspiracy to attack an out-of-state vehicle belonging to an African-American who was believed to be a civil rights worker, see *id.* at 89-90), the Court found "no occasion . . . to trace out [the statute's] constitutionally permissible periphery." *Id.* at 107.

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4. Section 1985(3) provides a remedy where injury results when "two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3).

B. There Is No Basis for Permitting An Exception To The General Rule Here

Under the principle articulated in *Salerno*, as applied in *Raines* and *Griffin*, a state cannot establish that Section 12202's abrogation of state sovereign immunity in Title II cases is facially unlawful unless it can show that the statute *in all of its applications* exceeds Congress's authority. The lower-court cases that have applied a facial analysis to Title II claims have suggested three reasons for departing from the *Salerno* rule here: (1) that the requirement of "congruence and proportionality," *City of Boerne*, 521 U.S. at 520, is simply not capable of being applied in a case-by-case manner; (2) that this Court's cases applying the "congruence and proportionality" test—and particularly *Garrett*—have declined to engage in an as-applied analysis; and (3) that because the operative section of Title II applies to all "public entities" without making any textual distinction among them, a finding that the statute exceeds Congress's authority as applied to any one public entity necessarily infects the entire section. These arguments do not justify a departure from the settled *Salerno* rule.

1. *Congruence And Proportionality Analysis May Properly Be Approached On An As-Applied Basis*—There is nothing inherent in *City of Boerne*'s "congruence and proportionality" test that would make the *Salerno/Raines/Griffin* rule inapplicable. After all, the basic question addressed in *Boerne* was the same question addressed in *Raines* and *Griffin*: Was this enactment within the scope of Congress's power to enforce the Civil War Amendments? And it is certainly intellectually coherent to evaluate whether a particular *application* of a congressional enactment is congruent and proportional to an actual or threatened violation of constitutional rights. Indeed, the wide-ranging coverage of ADA Title II almost compels such an inquiry. As petitioner notes, "Title II encompasses an array of qualitatively different governmental activities within the broad phrase, 'services, programs, or activities.'" Pet. Br. 14. Although the Court might conclude that the record of unconstitutional state disability-based discrimination is sufficiently strong to justify Title II in all of its applications, both the actual substantive obligations imposed by the statute and the constitutional predicates for imposing those

obligations are likely to vary widely across different areas of state government operations. Cf. *National Treasury Employees Union*, 513 U.S. at 478 (refusing in case brought by lower-level executive branch employees to consider constitutionality of statutory honoraria ban as it would apply to senior executive branch officials, because such an application would "presen[t] a different constitutional question than the one we decide today"). For example, although it is generally true that "States are not required to make special accommodations for the disabled," *Garrett*, 531 U.S. at 367, in some areas of state government (such as the operation of prisons and mental institutions, the conduct of elections, and judicial proceedings) the Fourteenth Amendment has been held to require some forms of accommodation. See part I-C, *infra*. The Section 5 basis for applying Title II's accommodation requirement will obviously be much stronger in those areas than in areas where, as in employment, any accommodations "have to come from positive law." *Garrett*, 531 U.S. at 368.

In some cases the specific state action challenged under Title II will itself violate the Constitution. The challenged action may, for example, constitute irrational discrimination like the discriminatory zoning decision in *City of Cleburne*, *supra*. Or, as in the suits brought by *amici* Kiman and Popovich, the challenged action may consist of the failure to provide accommodation in those specific circumstances in which the Fourteenth Amendment imposes a duty to accommodate. See *Popovich*, 276 F.3d at 815 (because Due Process Clause requires state to provide hearing assistance to hearing-impaired parent in child custody hearing, Title II is congruent and proportional as applied in parent's suit challenging denial of such assistance); *Kiman*, 301 F.3d at 25 (because denial of cane, shower chair, and accessible toilet to inmate with ALS would violate the Cruel and Unusual Punishments Clause as incorporated in the Fourteenth Amendment, Title II is congruent and proportional as applied in inmate's suit challenging that denial). Application of Title II to such cases is perfectly congruent and proportional to a constitutional violation. In such cases, the statute does not add any additional *substantive* requirements to those imposed by the Fourteenth Amendment. But the statutory abrogation of state sovereign immunity has important *procedural* consequences, because the Fourteenth Amendment does

not of its own force abrogate Eleventh Amendment immunity. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989).

This Court's *Boerne* line of cases makes clear, however, that Congress has power to reach more than just those instances where the defendant's conduct itself violates the Fourteenth Amendment. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. In each of the areas of state government operations we address in part I-C of this brief, the requirements imposed by Title II come extremely close to the requirements imposed by the Constitution itself. Although the statutory and constitutional standards of liability are not identical, Title II's additional margin of protection is justified by a long record of state constitutional violations in these areas—a record typically backed up by "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). In each of these areas of state government, the application of Title II is so closely tied to actual or threatened constitutional violations as to satisfy the congruence and proportionality test—even if the statute's mandates in these areas go somewhat beyond what the Constitution compels. See *City of Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'") (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) ("Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.").

Where, as in the contexts we discuss in section C, application of Title II would be congruent and proportional to an actual or anticipated constitutional violation, it should, as in *Raines* and *Griffin*, make no difference that *other* applications of the statutory language might extend beyond the sweep of Congress's enforcement power. For example, a number of lower courts have ruled that the application of Title II to prohibit states from charging

a nominal fee for handicapped parking placards exceeds Congress's Section 5 authority because *that specific application* of the statute lacks congruence and proportionality to any actual or threatened constitutional violation. See, *e.g.*, *Neinast* v. *Texas*, 217 F.3d 275, 282 (5th Cir. 2000), cert. denied, 531 U.S. 1190 (2001); *Brown* v. *N.C. Div. of Motor Vehicles*, 166 F.3d 698, 707-708 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001). Even if those decisions are correct, it would be nonsensical to say that Title II's lack of congruence and proportionality in *that* application has any bearing on the constitutionality of applying Title II and the accompanying abrogation of state sovereign immunity in other areas of state government where there is a strong predicate of past and threatened constitutional violations. Such a result would impose on litigants and courts the "'undesirable'" burden of "'consider[ing] every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.'" *Raines*, 362 U.S. at 21 (quoting *Barrows* v. *Jackson*, 346 U.S. 249, 256 (1953)).

Nor does a claim that Congress has exceeded its Section 5 powers represent one of the narrow constitutional contexts in which this Court has permitted a party to challenge a statute on its face based on potential applications that go beyond the conduct in which that party has engaged. The Court has so departed from the *Salerno* principle only in contexts where the mere presence of an overbroad statute on the books could have a significant chilling effect on protected activity. See, *e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 767-769 (1982) (First Amendment overbreadth doctrine); *Fargo Women's Health Org.* v. *Schafer*, 507 U.S. 1013, 1013 (1993) (O'Connor, J., concurring) (Fourteenth Amendment prohibition on imposing an undue burden on a woman's choice to have an abortion). Unlike in those contexts, limitations on Congress's Section 5 power do not define a sphere of protected primary conduct, for Congress can often reach the same state conduct under its other enumerated powers. See, *e.g.*, *Garrett*, 531 U.S. at 374 n.9 (although ADA Title I exceeds Congress's Section 5 authority, it "still prescribes standards applicable to the States"). And unlike private individuals, states are large and sophisticated entities that are fully capable of asserting their rights and are unlikely to be chilled by the presence on the federal statute books of a law that in some of its applications is disproportionate to actual

or threatened constitutional violations. If the Court were to rely on the existence of some overbreadth in Title II to strike down Section 12202's abrogation of state sovereign immunity on its face, the Court would frustrate Congress from regulating state conduct it plainly intended to and had the power to regulate. The result would be simply to punish Congress for sloppy drafting—a practice entirely inconsistent with the separation of powers. See Alfred Hill, *Some Realism About Facial Invalidation of Statutes*, 30 HOFSTRA L. REV. 647, 665-666 (2002).

2. Garrett *Employed An As-Applied Approach*—This Court's decision in *Garrett*, which examined the Fourteenth Amendment basis for ADA Title I's prohibition of employment discrimination, followed these principles. Although one lower court has described *Garrett* as having addressed the constitutionality of Title I "in its entirety," *Thompson*, 278 F.3d at 1027-1028 n.4, that is incorrect. To the contrary, the Court in *Garrett* expressly limited its constitutional analysis to Title I's application to cases, like the one before it, that implicated Section 12202's abrogation of state sovereign immunity—cases in which the defendants were *state governments* and the plaintiffs were private individuals who sought retrospective monetary relief. See *Garrett*, 531 U.S. at 368-369 (declining to consider Section 5 basis for applying Title I to "units of local government, such as cities and counties"); *id.* at 374 n.9 (noting that its decision did not reach cases in which the federal government sought to enforce Title I against the states, nor did it reach cases in which private parties sought prospective injunctive relief). And although Section 12202's abrogation of state sovereign immunity applies uniformly to both Title I and Title II, the Court invalidated that abrogation only as it applied to Title I. See *Garrett*, 531 U.S. at 360 n.1; see also *id.* at 371 n.7 (declining to consider evidence of unconstitutional state discrimination in public services, because that discrimination is addressed by Title II, and the case before the Court involved only employment discrimination and Title I).

To be sure, there is language in some post-*Boerne* cases that appears to discuss unconstitutional statutory applications that

were not specifically before the Court.[5] But nothing in the Court's *language* in these cases could overrule the *Salerno* principle as entrenched by the square *holdings* of *Raines* and *Griffin*. See *Alexander* v. *Sandoval*, 532 U.S. 275, 282 (2001) ("[T]his Court is bound by holdings, not language."). And in each of the post-*Boerne* cases, the Court has in fact made clear that the statute at issue lacked a proper Section 5 basis on the facts of the case before it.[6] In each of these cases, the lack of any good reason to believe that the challenged state conduct violated the Constitution—combined with the lack of any strong record of state constitutional

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[5] In *Boerne*, the Court supported its conclusion that the Religious Freedom Restoration Act lacked congruence and proportionality by noting that the statute "intru[ded] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter," *City of Boerne*, 521 U.S. at 532, although the specific case involved a local zoning decision. In *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), the Court supported its conclusion that the Patent Remedy Act lacked congruence and proportionality by noting that the statute did not require a showing of intent to infringe the plaintiff's patent, see *id.* at 645, although the case before the Court involved an allegation of intentional deprivation. See *id.* at 653-654 (Stevens, J., dissenting). And in *Garrett* itself, the Court supported its conclusion that ADA Title I lacked congruence and proportionality by noting that the statute requires physical modifications to workplace facilities and that it prohibits some practices that have a disparate impact on people with disabilities, *Garrett*, 531 U.S. at 372-373, although neither of these requirements was implicated by the facts of the case before the Court.

[6] In *Boerne*, the Court determined that because "numerous state laws, *such as the zoning regulations at issue here*, impose a substantial burden on a large class of individuals," it could not conclude that such regulations had purposely targeted religion merely because they imposed such a burden. *City of Boerne*, 521 U.S. at 535 (emphasis added). In *Florida Prepaid*, the Court observed that intentional infringement of patents by a state could not violate the Due Process Clause unless "the State provides no remedy, or only inadequate remedies, to injured patent owners," and it further noted that "the State of Florida provides remedies to patent owners for alleged infringement on the part of the State." *Florida Prepaid*, 527 U.S. at 642-644 & n.9. And in *Garrett*, the Court made clear both that the Fourteenth Amendment generally does not require states "to make special accommodations for the disabled" and that "adverse, disparate treatment" of people with disabilities does not in and of itself violate the Constitution. *Garrett*, 531 U.S. at 367, 370. But the plaintiffs had alleged nothing more than simple disparate treatment and the failure to accommodate. See *id.* at 362.

violations or other factors to justify Congress's adoption of a prophylactic rule[7]—dictated the Court's conclusion that the statutes at issue, *as applied to the plaintiffs and defendants before the court*, exceeded congressional authority. These cases thus do not—implicitly or explicitly—overrule the holdings of *Raines* and *Griffin* that the Court must approach Congress's exercise of its Civil War Amendment enforcement authority on an as-applied basis. To the contrary, they are entirely consistent with those holdings.

3. *Nothing In Title II's Language Requires A Facial Approach To The Statute's Constitutionality*—Nor is there anything in the language of Title II that would require the Court to evaluate the Section 5 basis for the statute on its face. In *Wessel*, the Fourth Circuit determined that because Title II applies equally to *any* "public entity" without distinguishing among different public entities, 42 U.S.C. § 12132, the court was bound to consider the constitutionality of the statute as it might apply to *all* such entities; the court could not limit its focus to the prison setting that was the context of the case before it. See *Wessel*, 306 F.3d at 207-208. The court concluded that "absent judicial redrafting of the statute, there is no narrower constitutional question to address" than the Section 5 basis for Title II as a whole. *Id.* at 208. But that conclusion is squarely inconsistent with *Garrett*. There, the Court limited its Section 5 analysis to Title I's application to state as opposed to local governments, see *Garrett*, 531 U.S. at 368-369, even though Title I by its terms applies equally to all "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. § 2000e(a) (incorporated by reference in 42 U.S.C. § 12111(2), (5), (7)).[8] And although the ADA's abrogation of sovereign immunity

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[7] See *City of Boerne*, 521 U.S. at 530 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."); *Florida Prepaid*, 527 U.S. at 640 ("In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); *Garrett*, 531 U.S. at 370 (finding "minimal evidence of unconstitutional state discrimination in employment against the disabled").

[8] Compare Title II's definition of "public entity," which includes "any State or local government," as well as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A), (B).

appears in a single section of the statute that applies to all titles of the ADA in an undifferentiated manner, see 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."), the Court held that section unconstitutional only as it applied to Title I. See *Garrett*, 531 U.S. at 360 n.1.

Garrett is hardly an anomaly in this respect. For "this Court has on several occasions declared a statute invalid as to a particular application without striking the entire provision that appears to encompass it." *National Treasury Employees Union*, 513 U.S. at 487 (O'Connor, J., concurring in the judgment in part and dissenting in part). The *National Treasury Employees Union* case provides a recent example. See *id.* at 477-478 (opinion of the Court) (holding the honoraria ban invalid only as applied to "Executive Branch employees below grade GS-16," although the relevant statute applied in an undifferentiated manner to any "Member, officer, or employee" of the federal government). *Raines* applied the same principle. Like Title II, the statute at issue in *Raines* applied to a broad and undifferentiated class of defendants—"any person" who infringed on protected rights—and the Court did not dispute the district court's conclusion that the statute's broad language would exceed congressional authority as applied to persons acting as purely private individuals. *Raines*, 362 U.S. at 19-20. But the Court concluded that, whatever the answer to the question of the statute's constitutionality as applied to private defendants, the constitutionality of the statute's application to state election officials must be considered on its own merits. For despite the statute's broad "any person" language, there was no reason to believe that Congress would have intended the entire statutory provision to fall if its application to one possible class of defendants exceeded the legislature's Fifteenth Amendment enforcement authority. See *id.* at 22-24. *Griffin* is to similar effect. See *Griffin*, 403 U.S. at 104, 107.

In holding that unconstitutional applications of broad and undifferentiated statutory language do not invalidate that language in its entirety, *Raines* and *Griffin* applied basic principles of statutory severability. See *Regan* v. *Time, Inc.*, 468 U.S. at 653

(plurality opinion) (observing that severability "is largely a question of legislative intent, but the presumption is in favor of severability."). Those principles are particularly apposite here, for Congress has made doubly clear that it did not intend for invalid applications of the ADA's abrogation of Eleventh Amendment immunity to scuttle that abrogation as a whole. Not only does the ADA contain the standard severability section, 42 U.S.C. § 12213, but the statement of purpose in the statutory text expressly declares Congress's intent to go as far as its power permits by "invok[ing] the sweep of congressional authority" to respond to disability-based discrimination, 42 U.S.C. § 12101(b)(4). Cf. *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams*, 122 S. Ct. 681, 691 (2002) (relying on Section 12101's "findings and purposes" to interpret operative provisions of the ADA); *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 484-487 (1999) (same). To evaluate the Section 5 basis for Section 12202's abrogation of state sovereign immunity "by considering Title II in its entirety," *Thompson*, 278 F.3d at 1028 n.4, would be to disregard Congress's plainly expressed intentions on this question. This Court did not engage in such a broad-brush analysis in *Garrett*, and it should not do so here.

C. Because There Are Plainly Numerous Circumstances In Which Title II Is Valid Section 5 Legislation, Any Facial Challenge To The Statute's Abrogation Of State Sovereign Immunity Must Fail

Because the *Salerno* rule applies fully to a claim that Congress has exceeded its power to enforce the Civil War Amendments, lower courts that have held 42 U.S.C. § 12202's abrogation of state sovereign immunity under ADA Title II to be facially invalid cannot be right. For Section 12202 could be unconstitutional on its face only if "no set of circumstances" exists under which it would be valid. *Salerno*, 481 U.S. at 745. Petitioner and its *amicus* plainly cannot satisfy that heavy burden. Indeed, petitioner wisely disclaims any effort to shoulder that burden (Pet. Br. 15), for numerous circumstances exist in which the application of Title II to state conduct is congruent and proportional to actual or threatened violations of the Fourteenth Amendment. Without making any attempt to be exhaustive, the following subsections

identify four categories of such circumstances. In many of the instances discussed below, the conduct challenged under Title II also violates the Constitution, and the statute serves the limited but important purpose of abrogating state sovereign immunity. In others, the statute adds substantive obligations to those imposed by the Constitution, but it does so only as "reasonably prophylactic legislation." *Kimel*, 528 U.S. at 88.[9]

1. *Prison Conditions*—In *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 209 (1998), this Court held that Title II's text "unmistakably includes state prisons and prisoners within its coverage." Following *Yeskey*, a number of lower courts have applied Title II to cases in which prison officials, by failing to accommodate the medical or sanitary needs of inmates with disabilities, have caused injury. *Amicus* Matthew Kiman's case is paradigmatic. Kiman, who has amyotrophic lateral sclerosis, was incarcerated in a New Hampshire state prison. Prison officials denied him numerous accommodations for his condition, including a cane to permit him to exercise, a chair to keep him from repeatedly falling in the shower, and an accessible toilet to permit him to perform acts of personal hygiene without the assistance of his cellmates. See *Kiman*, 301 F.3d at 14-15; see also, *e.g.*, *St. Pierre* v. *McDaniel*, 172 F.3d 58 (9th Cir. 1999) (table)

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[9] Because this case involves the constitutionality of Section 12202's abrogation of state sovereign immunity only, our discussion in text is limited to classes of cases in which states themselves are likely to be defendants. There are, of course, numerous other applications of Title II in which plaintiffs challenge the decisions of local governments, who are not entitled to immunity. See *Garrett*, 531 U.S. at 369. Many of these applications have a valid Section 5 basis as well. For example, the application of Title II to discriminatory local zoning decisions is congruent and proportional to the significant record of unconstitutional zoning discrimination against people with disabilities—a record exemplified by this Court's decision in *Cleburne*, 473 U.S. at 450, and confirmed by a string of lower court cases, see, *e.g.*, *Horizon House Dev. Servs., Inc.* v. *Township of Upper Southampton*, 804 F. Supp. 683, 700 (E.D. Pa. 1992), aff'd, 995 F.2d 217 (3d. Cir. 1993); *Burstyn* v. *City of Miami Beach*, 663 F. Supp. 528, 533-537 (S.D. Fla. 1987); see also, *e.g.*, *Epicenter, Inc.* v. *City of Steubenville*, 924 F. Supp. 845, 853 (S.D. Ohio 1996) (ruling for plaintiff on statutory grounds); *Arc of New Jersey, Inc.* v. *New Jersey*, 950 F. Supp. 637, 648-649 (D.N.J. 1996) (same); *Sunrise Dev., Inc.* v. *Town of Huntington*, 62 F. Supp. 2d 762, 765 (E.D.N.Y. 1999) (same).

(reversing grant of summary judgment to defendant in Title II case alleging that denial of crutches to inmate denied him access to showers, recreation, meals, and medical facilities); *Hicks* v. *Armstrong*, 116 F. Supp. 2d 287, 289-290 (D. Conn. 1999) (denying motion to dismiss in Title II case involving inmate with paraplegia denied, *inter alia*, accessible shower and toilet facilities). The application of Title II to cases like Kiman's is plainly congruent and proportional to actual or anticipated violations of the Cruel and Unusual Punishments Clause of the Eighth Amendment, as incorporated in the Fourteenth Amendment.

This Court has held that the Eighth Amendment imposes on states an affirmative obligation to protect the health and safety of inmates. See, *e.g.*, *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976). Prison officials violate their constitutional duty to avoid "deliberate indifference to serious medical needs of prisoners," *id.* at 104, when they "ignore the basic needs of a handicapped individual or postpone addressing those needs out of mere convenience or apathy." *LaFaut* v. *Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J., sitting by designation). Applying these principles, a number of lower courts have found violations of the Eighth Amendment when state prison officials have failed to provide accommodation to the medical or sanitary needs of individuals with disabilities.[10]

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[10] See, *e.g.*, *LaFaut*, 834 F.2d at 394 (failure to provide appropriate toilet facilities and rehabilitation therapy to inmate with paraplegia violated Eighth Amendment); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (denial of wheelchair to inmate with paralysis, resulting in inmate's inability to shower himself or leave his cell, violated Eighth Amendment); *Beckford* v. *Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (Eighth Amendment violation existed where plaintiff "was regularly deprived use of his wheelchair for extended periods of time, plaintiff was unable to shower, and . . . he was not allowed to use a cup in order to try to bathe by taking water out of his cell toilet or drinking fountain"); *Clarkson* v. *Coughlin*, 898 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (denial of interpretive services and assistive devices to deaf inmates during medical treatment violated Eighth Amendment where "communication between the patient and medical personnel [was] essential to the treatment in question"); *Casey* v. *Lewis*, 834 F. Supp. 1569, 1582 (D.Ariz. 1993) (failure to provide accessible bathrooms, showers, and cells violated Eighth Amendment).

The prison conditions context is thus decisively unlike the employment context at issue in *Garrett*. While it is generally true that "States are not required by the Fourteenth Amendment to make special accommodations" for employees with disabilities, *Garrett*, 531 U.S. at 367, by incorporating the Eighth Amendment's Cruel and Unusual Punishments Clause the Fourteenth Amendment imposes a requirement that states accommodate those they confine. At least as applied to cases where a prisoner requests accommodations that relate to serious medical or sanitary needs, Title II's requirement of accommodation thus directly responds to actual or threatened violations of the Fourteenth Amendment. Where a prisoner requests accommodations under Title II, moreover, the determination whether that request is "reasonable" would necessarily take account of the special "institutional requirements"—including "[s]ecurity concerns, safety concerns, and administrative exigencies"—of the prison setting. *Love* v. *Westville Correctional Center*, 103 F.3d 558, 561 (7th Cir. 1996) (dicta). As such, the requirements of Title II will extend to only a limited degree beyond the requirements imposed by the Constitution itself. Given the "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), of extensive state violations of the Eighth Amendment in this context, see n. 10, *supra*, Title II's somewhat broader coverage is fully justified as "reasonably prophylactic legislation." *Kimel*, 528 U.S. at 88.

2. *Judicial Proceedings*—In numerous Title II cases, plaintiffs have sought accommodations to provide them access to and enable them to participate in judicial proceedings. The cases often follow one of two patterns. In the first, an individual with a disability who is a criminal defendant or a litigant in an especially important civil action such as one "involving state controls or intrusions on family relationships," *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 116 (1996), seeks an accommodation to enable him to participate meaningfully in the proceedings. In his pending case, for example, *amicus* Joseph Popovich contends that a state court violated Title II by denying him hearing assistance that would have enabled him to participate in a proceeding concerning custody of his daughter. See *Popovich*, 276 F.3d at 811; see also, *e.g.*, *Duvall* v. *County of Kitsap*, 260 F.3d 1124, 1135-1138 (9th Cir. 2001) (summary judgment for defendant inappropriate in Title II case brought by

hearing-impaired husband denied real-time transcription services at his marital dissolution hearing). Such an application of Title II is plainly congruent and proportional to an actual or threatened violation of the Fourteenth Amendment.

Participants in such especially important judicial proceedings have a constitutional right to be able to participate in and follow the case against them. See, *e.g.*, *Drope* v. *Missouri*, 420 U.S. 162, 171, 181 (1975) (holding that a criminal defendant may not be tried unless he can "understand the nature and object of the proceedings against him," "consult with counsel," and "assist in preparing his defense," and that he must be able to do so throughout the trial).[11] Where an accommodation such as an interpreter is necessary to assure that the individual can participate in and follow the proceedings, the Constitution mandates that the state provide it. See *United States ex rel. Negron* v. *New York*, 434 F.2d 386, 389-390 (2d Cir. 1970) (due process requires that non-English-speaking criminal defendant have the services of a foreign-language interpreter at trial).

The state may have a constitutional obligation to provide such accommodations even if doing so costs the state money. In this respect, this Court's line of cases requiring states to accommodate litigants' poverty in especially important proceedings is instructive. See, *e.g.*, *M.L.B.*, 519 U.S. at 124 (in case involving termination of mother's parental rights, state violated Fourteenth Amendment by dismissing mother's appeal because she could not afford to pay for a trial transcript); *Boddie* v. *Connecticut*, 401 U.S. 371, 380-81 (1971) (state law conditioning divorce decree on the parties' ability to pay court fees and costs violates Fourteenth Amendment); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (Fourteenth Amendment prohibits state from conditioning direct appellate review of a criminal conviction on defendant's ability to purchase a

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[11] Although the cases cited in this paragraph involve criminal proceedings, a similar state obligation necessarily applies in especially important civil proceedings like those defining family relationships given the nature of the interest involved. See *M.L.B.*, 519 U.S. at 125; *id.* at 128-129 (Kennedy, J., concurring in the judgment); cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976) (process that is due depends, *inter alia*, on the strength of the private interest affected by official action).

trial transcript). These cases stand for the proposition that states have an affirmative obligation to facilitate participation in such important court proceedings by all individuals on equal terms, even if doing so means foregoing an important source of revenue—at least where doing so imposes no "undue burden on the State." *M.L.B.*, 519 U.S. at 122.

The application of Title II to a case like Popovich's directly enforces that principle. The statute provides that no qualified individual with a disability may "be excluded from participation in or be denied the benefits of" public services and activities like judicial proceedings. 42 U.S.C. § 12132. The Attorney General has interpreted that language to require states to "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of," such services and activities. 28 C.F.R. § 35.160(b)(1).[12] Echoing the "undue burden" limitation in this Court's constitutional precedents, *M.L.B.*, 519 U.S. at 122, the relevant regulations make clear that states need not take any action that "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. Title II's requirements here are thus extremely close to the requirements of the Constitution itself. As applied to a case like Popovich's, where the plaintiff sought an inexpensive accommodation that was necessary to permit him "to participate meaningfully in" the determination whether he would have custody of his daughter, *Popovich*, 276 F.3d at 815, Title II is clearly congruent and proportional to actual or threatened constitutional violations.

The second common fact pattern in Title II access-to-judicial-process cases involves courthouses that are physically inaccessible to individuals with mobility impairments. The widespread inaccessibility of courthouses throughout the nation was a major problem at the time the ADA was enacted, and the

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[12] The Attorney General's regulations were the product of notice-and-comment rulemaking pursuant to a specific grant of regulatory authority. See 42 U.S.C. § 12134(a). Accordingly, they are entitled to deference. *Chevron U.S.A. Inc.* v. *Echazabal*, 122 S. Ct. 2045, 2049, 2051-2052 (2002).

large number of post-enactment cases targeting inaccessible court facilities demonstrates that the problem persists.[13] Where inaccessible courthouses make it impossible for litigants with disabilities to participate effectively in their cases, the application of Title II will rest on much the same constitutional basis as underlies Popovich's case. See, *e.g.*, *Lane* v. *Tennessee*, 315 F.3d 680 (6th Cir. 2003) (affirming denial of motion to dismiss in Title II case brought by a criminal defendant arrested for two misdemeanors who alleged that he was forced to crawl up stairs to attend a hearing at an inaccessible courthouse). But even where the plaintiff has no similar constitutional interest in access to a particular trial, the state's operation of a court system that "when viewed in its entirety" is "not readily accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.150(a), raises serious constitutional concerns. For such an inaccessible court system effectively closes off an important area of state government to an entire class of people defined solely by impairments that are not currently in their control. "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Application of Title II to assure access to courthouses is thus congruent and proportional to a potential violation of the Fourteenth Amendment.

3. *Elections*—In a number of cases, plaintiffs have challenged state voter qualifications or the accessibility of polling places under Title II. These applications are congruent and proportional to actual or threatened violations of the Equal Protection Clause. The right to vote "is a fundamental matter in a free and democratic society" because it is "preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U.S. 533, 561-62 (1964). As such, "'[o]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'" *Bush* v.

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[13] See, *e.g.*, *Shotz* v. *Cates*, 256 F.3d 1077, 1080-1081 (11th Cir. 2001); *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir. 1999); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 533-534 (W.D. Ark. 1998); *Kroll* v. *St. Charles County*, 766 F. Supp. 744, 752 (E.D. Mo. 1991).

Gore, 531 U.S. 98, 105 (2000) (quoting *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)).

The congressional findings accompanying the ADA list "voting" as one of the "critical areas" in which "discrimination against individuals with disabilities persists." 42 U.S.C. § 12101(a)(3). And at least two common fact patterns in this area implicate significant constitutional concerns. First, a qualified individual with a disability is surely denied the fundamental right to vote if he is denied a place to vote. Just as a voter's wealth "is not germane to one's ability to participate intelligently in the electoral process," *Harper*, 383 U.S. at 668, so too is a voter's ability to climb stairs or overcome other physical obstacles irrelevant to legitimate voting qualifications. Yet many Title II cases involve the denial of the vote to individuals with disabilities for no better reason than that they cannot overcome physical barriers that block access to polling places. See, *e.g.*, *New York* v. *County of Schoharie*, 82 F. Supp. 2d 19, 21, 25-26 (N.D.N.Y. 2000) (all of the county's 25 polling places were inaccessible, either in terms of parking, exterior pathways, the entrance to the building, or the interior of the building); *New York* v. *County of Delaware*, 82 F. Supp. 2d 12, 14 (N.D.N.Y. 2000) (all but one of 44 polling places were inaccessible); *see also New York* v. *County of Delaware*, 2000 WL 1264302 (N.D.N.Y Aug. 16, 2000) (noting that roughly half of the polling places in the counties of Delaware and Schoharie were still inaccessible six months after the initial decisions).[14] By requiring the removal of physical barriers to

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[14] Congress was well aware of this problem when it enacted the ADA. See, *e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989); *Americans with Disabilities Act of 1989: Hearings Before House Comm. on The Judiciary & Subcomm. on Civil & Const. Rights* 160 (1989) (statement of Laura Cooper); *Americans with Disabilities Act of 1989: Hearings Before Senate Comm. on Labor & Human Resources & Subcom. on the Handicapped* 663 (1989) (statement of Mary Lynn Jones); *Hearing On H.R. 2273, Americans with Disabilities Act of 1989: Hearing Before Subcom. on Select Educ. of House Comm. on Educ. & Labor* 65 (1989) (statement of Rick Edwards); 135 CONG. REC. S10793 (1989) (statement of Sen. Biden). Congress was also aware that the opportunity to cast an absentee ballot was no solution to this problem. Because absentee ballots typically must be cast well in advance of election day, an absentee option does nothing for the individual who discovers that his polling place is inaccessible for the first time when he goes to vote. It also

voting, see 28 C.F.R. § 35.149, Title II directly responds to state violations of individuals' fundamental constitutional right to vote.

It is irrelevant for these purposes that Title II may require states to incur some cost to eliminate those barriers.[15] Poll taxes, for example, may be a source of revenue that finances elections. See *Harper*, 383 U.S. at 674 (Black, J., dissenting). But states may not condition the franchise on the payment of those taxes, for the ability to pay one's way is irrelevant to legitimate voting qualifications. See *Harper*, 383 U.S. at 668. Cf. *Bullock* v. *Carter*, 405 U.S. 134, 147-148 (1972) (though candidate filing fees "serve to relieve the State treasury of the cost of conducting the primary elections," candidates may not be excluded on the basis of inability to pay such a fee, because "legitimate costs of the democratic process" should be borne by "the taxpayers generally"). To deny an individual with a disability the opportunity to vote because of the cost of retrofitting polling places built in an inaccessible manner similarly "introduce[s] a capricious or irrelevant factor" into the democratic process. *Harper*, 383 U.S. at 668.

The second common fact pattern involves formal disqualification of voters with disabilities. On many occasions states have denied people with mental disabilities the right to vote without engaging in the individualized examination of voting competence the Constitution requires. See *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 51-56 (D. Maine 2001) (state constitutional provision disenfranchising persons under guardianship by reason of mental illness violates Fourteenth Amendment because not

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requires an individual with a disability to cast a ballot before the candidates have had a full opportunity to make their case to the voters. See S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989).

[15] The cost should not be overstated. Where existing facilities are concerned, relevant regulations require only that "the service, program, or activity, *when viewed in its entirety*, [be] readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). They do not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a)(1). See also *Nelson* v. *Miller*, 950 F. Supp 201, 204-05 (W.D. Mich. 1996) (Title II requires access to ballot box, but not necessarily the means of voting preferred by an individual with a disability), aff'd, 170 F.3d 641 (6th Cir. 1999).

narrowly tailored to incompetent voters); *Manhattan State Citizens' Group, Inc.* v. *Bass*, 524 F. Supp. 1270, 1274-75 (S.D.N.Y. 1981) (state statute disenfranchising, *inter alia*, people involuntarily committed to hospitals or mental institutions violates Fourteenth Amendment as applied to those who had not been adjudged incompetent); see also *City of Cleburne*, 473 U.S. at 464 (Marshall, J., concurring in the judgment in part and dissenting in part) ("As of 1979, most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials."). By prohibiting discrimination against any "qualified individual with a disability," 42 U.S.C. § 12132—in the voting context, those individuals with disabilities who would satisfy an individualized determination of competence—Title II responds directly to this constitutional violation. See *Doe*, 156 F. Supp. 2d at 57-59 (finding Title II violation as well as constitutional violation).

4. *Unnecessary Institutionalization*—In *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), this Court held that Title II in many cases prohibits the unnecessary institutionalization of people with disabilities. In particular, the Court held that the Attorney General's "integration regulation," which mandates that public services be administered "in the most integrated setting appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d), "require[s] placement of persons with mental disabilities in community settings rather than in institutions" under certain circumstances: "Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead*, 527 U.S. at 587. *Olmstead*'s application of Title II is congruent and proportional to actual and anticipated violations of the Fourteenth Amendment's Due Process Clause.

In *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), this Court held that the Due Process Clause affords individuals confined in state institutions a qualified right to freedom from restraint. In particular, the state "may not restrain residents except when and to

the extent professional judgment deems this necessary to assure such safety [of residents and staff] or to provide needed training." *Id.* at 324. In determining whether the state has satisfied that duty, the Court held, the judgments of the state's treating professionals are entitled to substantial deference. "'[T]he Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.'" *Id.* at 321 (quoting *Romeo* v. *Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, C.J., concurring in the judgment)).

The plaintiff in *Youngberg* did not contend that his institutionalization *itself* constituted a professionally unjustified restraint; he focused on the state's imposition of additional restraints on him *during the course of* his institutionalization. See *id.* at 310. But the Court's prohibition on professionally unjustified restraint necessarily extends to the "'massive curtailment of liberty,'" *Vitek* v. *Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey* v. *Cady*, 405 U.S. 504, 506 (1972)), inherent in the decision to keep an individual confined in an institution. A number of lower courts have thus found that states have violated *Youngberg*'s due process principles by disregarding the judgments of their own professionals and keeping individuals with disabilities confined in institutions. See, *e.g.*, *Thomas S.* v. *Morrow*, 781 F.2d 367, 374-375 (4th Cir.) (upholding, as proper application of *Youngberg*, district court order mandating, in accordance with the determination of the state's own professionals that treatment in an institutionalized setting was inappropriate, that state place plaintiff in a community treatment setting), cert. denied, 476 U.S. 1124, 479 U.S. 869 (1986); *Clark* v. *Cohen*, 794 F.2d 79, 87 (3d Cir.) (finding *Youngberg* violation where plaintiff was confined to an institution "rather than released to a CLA [community living arrangement], and was deprived of the training for community living that she could have received at a CLA, despite professional judgment, unanimous since 1976, that she should be released from [the institution] and receive such training"), cert. denied, 479 U.S. 962 (1986); *Thomas S.* v. *Flaherty*, 902 F.2d 250, 252, 254 (4th Cir.) (similar holding in class action phase of the *Thomas S.* case), cert. denied, 498 U.S. 951 (1990).

Title II's integration mandate, as interpreted in *Olmstead*, is thus extremely similar to the due process requirements imposed by *Youngberg*. Where *Youngberg* accords a "presumption of correctness" to the decisions of treating professionals, *Youngberg*, 457 U.S. at 324, *Olmstead* makes clear that "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program," *Olmstead*, 527 U.S. at 602. And the state's "fundamental alteration" defense, see *Olmstead*, 527 U.S. at 603-606 (plurality opinion), responds directly to *Youngberg*'s statement that due process jurisprudence must weigh individual liberty interests "against legitimate state interests and in light of the constraints under which most state institutions necessarily operate," *Youngberg*, 457 U.S. at 324.

To be sure, the integration mandate as interpreted in *Olmstead* is not identical to the due process principles announced in *Youngberg*. Compare *Olmstead*, 527 U.S. at 602 (providing that the state's professionals are entitled to deference only "generally," and only when their assessments are "reasonable"), with *Youngberg*, 457 U.S. at 323 (requiring deference to state professionals unless their judgments reflect "a *substantial* departure from accepted professional judgment") (emphasis added). Title II's integration mandate thus requires of states somewhat more than the Due Process Clause requires of its own force. But the statute's somewhat broader coverage simply serves to deter and remedy violations of *Youngberg*'s due process requirements—violations of which a substantial record existed at the time Congress adopted the ADA. See *Kimel*, 528 U.S. at 81 (recognizing Congress's power to adopt prophylactic legislation that deters and remedies constitutional violations); *Boerne*, 521 U.S. at 518 (same).

At the time the ADA was adopted, Congress could reasonably have seen a prohibition on unnecessary institutionalization as responding to actual or potential due process violations in two ways: first, by giving a remedy to individuals for whom institutionalization was professionally unjustified and thus unconstitutional under *Youngberg*; and second, by giving a remedy to those individuals whose institutionalization was initially proper

but who experienced unconstitutional conditions of confinement. Congress was well aware that professionally unjustified institutionalization of people with disabilities was widespread. The ADA's statutory findings state that segregation of individuals with disabilities is "a serious and pervasive social problem" and that discrimination "persists in such critical areas as . . . institutionalization." 42 U.S.C. § 12101(a)(2), (3). One source for these findings, a 1983 report of the United States Commission on Civil Rights, discussed the problem extensively. See U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 32-35 (1983). The report described "the systematic placement of handicapped people in substandard residential facilities"; noted the evolving professional consensus that "most training, treatment, and habilitation services can be better provided to handicapped people in small, community-based facilities"; yet concluded that "a great many handicapped persons remain in segregative facilities." *Ibid.* Cases like *Thomas S.* and *Clark* provided "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), that the widespread practice of unnecessary institutionalization likely violated the Constitution. And numerous other cases found that the *conditions* at particular institutions violated the Due Process Clause; many of these cases resulted in remedial decrees ordering that individuals be moved from institutional to community placements as the most effective remedy for those conditions. See, *e.g.*, ROBERT M. LEVY & LEONARD S. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 226-228 (1996) (collecting cases). Against this backdrop, Title II's integration mandate, to the extent it goes further than the Constitution at all, represents just the sort of mild prophylaxis that this Court has previously endorsed.

II. As Applied To The Parties And Circumstances Of This Case, Title II Is A Proper Exercise Of Congress's Section 5 Authority

Because neither Section 12202's abrogation of state sovereign immunity nor Title II's prohibition on discrimination is unconstitutional on its face, the only question properly before this Court is the question whether Section 12202's abrogation of state

sovereign immunity is valid as applied to *this* Title II case. We agree with respondent that the abrogation is valid as applied here.

Because our principal concern is with the Court's choice between a facial and an as-applied analysis, we make no effort to describe comprehensively the argument for upholding the abrogation of state sovereign immunity here. For that we refer the Court to the respondent's brief and the other *amicus* briefs. We focus here on one key aspect of this case that makes Title II, as applied here, clearly congruent and proportional to a violation of the Fourteenth Amendment: Respondent's complaint, fairly read, alleges that the decision to deny his license application "rest[ed] on an irrational prejudice against" people with mental illness. *Cleburne*, 473 U.S. at 450. At least at the pleading stage, then, this case must be treated as one that challenges state conduct that itself violates the Fourteenth Amendment. See *ibid.* (decision that rests on such irrational prejudice violates the Equal Protection Clause even under rational basis scrutiny).

Two procedural facts are of crucial importance here. First, respondent filed his complaint *pro se*. Second, the district court dismissed this case on the pleadings. "It is settled law that the allegations of [a *pro se*] complaint, 'however inartfully pleaded,' are held 'to less stringent standards than formal pleadings drafted by lawyers . . . .'" *Hughes* v. *Rowe*, 449 U.S. 5, 9 (1980) (*per curiam*) (quoting *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (*per curiam*); ellipses in *Hughes*). And even a counseled complaint can be dismissed only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

Although respondent's complaint is hardly a model of clarity, it contains numerous allegations which "can fairly be construed," *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 565 (2000) (*per curiam*), as alleging that petitioner rejected his application because of an irrational prejudice against people with a history of mental illness. For example, the complaint avers that petitioner ignored evidence of respondent's fitness to practice medicine, and that petitioner did so out of "bias and invidious discriminatory inclinations"—including "invidious subjective

discriminatory biases against" respondent for, among other things "having had a history of depression." Pet. App. 47-48. The complaint appears to allege that because of those biases, petitioner took acts—including numerous procedural irregularities in the licensing proceedings, see Pet. App. 41-43—"calculated to make *anyone with a history of mental illness* and/or Dr. Hason particularly . . . look as if they were unsafe and that no reasonable accommodation or agreement or adjustment could make them safe." Pet. App. 50 (emphasis added).

The mere denial of accommodation to a license applicant would not in itself demonstrate that the state acted arbitrarily and irrationally. See *Garrett*, 531 U.S. at 367. But the outright rejection of "anyone with a history of mental illness," Pet. App. 50, based on "invidious subjective discriminatory biases," Pet. App. 48, certainly would. For such an exclusion would reflect something more than simply "'negative attitudes' or 'fear.'" *Garrett*, 531 U.S. at 367 (rejecting proposition that decisions based on negative attitudes or fear "necessarily run[] afoul of the Fourteenth Amendment"). It would reflect sheer "prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440. When an entity like a state licensing board generally gives individualized consideration to applicants' qualifications but pretermits that individualized process in a particular case simply because of prejudice against an applicant with a disability and for no rational reason, *Cleburne* makes clear that an equal protection violation has occurred. See *id.* at 448. Because respondent's complaint, fairly read, alleges just such an equal protection violation, the application of Title II and the statutory abrogation provision to his case is congruent and proportional to an actual violation of the Fourteenth Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MEDICAL BOARD OF CALIFORNIA,
Petitioner,
v.
MICHAEL J. HASON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENT

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M'Culloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819) 4,10,11

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Popovich v. Cuyahoga County Court, 276 F.3d 808 (CA6 2002) 14,20

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Seminole Tribe v. Florida,
517 U.S. 44 (1996).....12

Shapiro v. Thompson, 394 U.S. 618 (1969).....9

Skinner v. Oklahoma, 316 U.S. 535 (1942).....9

Stanley v. Illinois, 405 U.S. 645 (1972).....9

Thompson v. Colorado,
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United States v. Ballin, 144 U.S. 1 (1892).....26

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42 U.S.C. § 12101(a)(6) (1990) 16

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28 C.F.R. § 35.150(a)(3) (2002) 20

28 C.F.R. § 35.164 (2002) 20

OTHER AUTHORITIES

A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes,* 86 Cornell L.Rev. 328 (2001) 25,26

JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002) 23,24

Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique,* 111 Yale L.J. 1707 (2002) 24,25

Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel,* 110 Yale L.J. 441 (2000) 27

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), the National Asian Pacific American Legal Consortium ("NAPALC"), the National Association for the Advancement of Colored People ("NAACP"), and the Puerto Rican Legal Defense and Education Fund ("PRLDEF") submit this Brief as *amici curiae* with the consent of the Parties,[1] in support of Respondent's argument that 42 U.S.C. §§ 12131-12132, Title II of the Americans With Disabilities Act, was validly enacted pursuant to the power of Congress under § 5 of the Fourteenth Amendment.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to insure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco and Washington, D.C. The Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before the Court involving the scope of Congress's legislative power. *See, e.g.*, *Hibbs* v. *Dep't of Human Res.*, 273 F.3d 844, (CA9 2001), *cert. granted*, 122 S.Ct. 2618 (U.S. June 24, 2002) (No. 01-1368); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001); *Lopez* v. *Monterey County*, 525 U.S. 266 (1999).

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

NAPALC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in addressing matters of discrimination that have an impact on the Asian Pacific American Community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The NAACP is a non-profit membership corporation that traces its roots to 1909 and was chartered by the State of New York. The NAACP supports the rights guaranteed by the Fourteenth Amendment and Congress's power under § 5 of that Amendment to pass legislation that in certain circumstances abrogates the state sovereignty immunity. Accordingly, the NAACP joins the other *amici* in filing this Brief and urging affirmance of the decision below.

PRLDEF is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws. The resolution of this case will have significant impact upon the extent to which PRLDEF and other civil rights organizations can protect the rights of their constituencies.

The Court's interpretation of the scope of Congress's power to enforce the Fourteenth Amendment through its § 5 powers will directly impact the communities represented by these *amici.* Therefore, *amici* present their views on this extremely important issue.

SUMMARY OF ARGUMENT

Failing to recognize the critical distinctions between Title I and Title II of the Americans with Disabilities Act ("Act" or "ADA"), Petitioner argues that this case is "an inevitable sequel to" *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). Pet'r Br. at 4. The *Garrett* Court, however, declined to rule on the constitutionality of Title II's abrogation of the states' Eleventh Amendment immunity—the precise issue presented in this case. *Id.* at 360 n.1, 372 n.7. Moreover, both the majority and minority in *Garrett* noted that much of the legislative history behind the Act pertained to discrimination against individuals with disabilities in the provision of state programs and services – that portion of the Act implicated here – and that the two titles had different remedial provisions. *Id.*

Although *amici* respectfully disagree with the Court's holding and analysis of § 5 legislation in *Garrett*, because of the critical distinctions between Title I and Title II of the ADA, the Court need not revisit the *Garrett* decision in order to find that Title II is appropriate legislation under § 5. While Title I was enacted to enforce persons' with disabilities Equal Protection rights to employment only, Title II operates to provide persons with disabilities the equal opportunity to obtain vital government services and to exercise fundamental rights and liberties, and protects the rights of individuals with disabilities to due process. Most of the fundamental rights protected by Title II, such as the right

to vote, to be free from cruel and unusual punishment, to travel, and to defend one's self in court, invoke heightened scrutiny. *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights are given the most exacting scrutiny") (citations omitted).

Because the underlying constitutional rights at issue invoke heightened scrutiny, the "congruence and proportionality" test applied to rational basis review legislation in *Garrett*, *Kimel* v. *Florida Bd. of Regents,* 528 U.S. 641 (1966), and *City of Boerne* v. *Flores,* 521 U.S. 507 (1997), is inappropriate. Rather, as it has historically done with legislation enacted to remedy the effects of discrimination invoking heightened scrutiny, the Court should apply the deferential rational means test first enunciated in *M'Culloch* v. *Maryland*, 4 Wheat (17 U.S.) 316 (1819). *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act of 1965). Under this analysis, there can be no doubt that Congress determined that Title II is a rational means of effectuating the protection of the rights of individuals with disabilities to exercise their fundamental rights.

Even if the Court were to apply the congruence and proportionality analysis implemented in *Garrett*, Title II's abrogation of the states' Eleventh Amendment immunity would survive. First, the legislative history behind Title II is compelling and well defined and demonstrates that Congress was reacting to a nationwide pattern of unconstitutional discrimination against persons with disabilities by the states in the provision of governmental services and programs. Second, the scope of Title II is no broader than necessary to remedy and prevent this unconstitutional discrimination.

As the Court instructed in *City of Boerne*, "[t]he appropriateness of remedial measures must be considered in

light of the evil presented." 521 U.S. at 530. Because the discrimination Congress was addressing protects the exercise of fundamental rights and liberties and is subject to heightened review, the scope of the remedial measures permitted under § 5 is broader than that permitted under § 5 when only rational basis review is invoked. That is, the deference afforded Congress in enacting § 5 legislation is inversely proportional to the scrutiny applied to the underlying state discrimination.

Applying the congruence and proportionality test, the Court looks at whether there is a "fit" between that conduct protected by the Fourteenth Amendment and that proscribed by the § 5 legislation. Here, because the bulk of the conduct affects fundamental rights and liberties, discrimination against individuals with disabilities in the exercise of these rights would fail heightened scrutiny analysis. Indeed, it would even fail rational basis review. Appropriately, Congress carefully defined the contours of Title II to prevent and remedy this state discrimination against individuals with disabilities.

Title II is structured so that a state is required to make only "reasonable modifications" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). In addition, the state is required to make these modifications only for "qualified individual[s] with a disability," defined as

> individual[s] with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meet[] the essential eligibility requirements for the receipt of services or the

> participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Finally, although Title II of the ADA meets the congruence and proportionality test set out in *Garrett*, *amici* do not wish to endorse this standard as proper for review of *any* legislation. For the reasons discussed in dissenting opinions in *Garrett* and *Kimel, amici* respectfully submit that this standard is premised on an unworkable view of the legislative process, effectively requires Congress to dramatically alter the way in which it legislates, and threatens to violate separation of powers principles by imposing judicial requirements upon Congress's legislative procedure. *Amici*, therefore, respectfully urge the Court to reconsider the congruence and proportionality standard as applied in *Garrett* and return to its prior rational means standard enunciated in *M'Culloch*.

ARGUMENT

I. THIS CASE IS NOT CONTROLLED *BY BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT* BECAUSE TITLES I AND II OF THE ADA ARE DISTINCT IN THEIR SCOPE, APPLICATION, AND LEGISLATIVE HISTORY

Petitioners contend that whether Title II of the ADA is appropriate legislation under § 5 of the Fourteenth Amendment is controlled by *Garrett*, 531 U.S. 356, which held that employees may not recover money damages from the state when the state, as employer, fails to comply with the provisions of Title I of the ADA. In *Garrett*, however, the Court recognized that the courts of appeals were divided on

whether Title II of the ADA is appropriate legislation under § 5 of the Fourteenth Amendment, and the Court expressly declined to address whether Congress validly abrogated state sovereign immunity when it enacted Title II of the ADA and therefore expressly limited its holding to Title I.

Because of critical distinctions between Title I and Title II, *Garrett*'s holding cannot simply be extended to cover Title II.

Title I applies to the states and private entities as employers, while Title II is specifically targeted *only* at the states as public entities. While Title I applies to the states, it was not specifically designed to prevent only state discrimination against individuals with disabilities in employment. Rather, it prohibits discrimination against individuals with disabilities generally and clearly reaches private employment relationships. *See* 42 U.S.C. §§ 12112(a), 12112(2), (5), (7) (Title I of the ADA prohibits certain employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual with regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

Conversely, Title II specifically applies *only* to public entities (state and local governments and their political subdivisions and the National Railroad Passenger Corp. and any commuter authority) and protects qualified individuals with a disability from being excluded by reason of disability "from participation in or [from being] denied the benefits of services, programs, or activities of a public entity, or [from being] subjected to discrimination by any such entity." 42 U.S.C. § 12132. Congress found, and intended to remedy, state discrimination against individuals with disabilities

occurring within the scope of primarily state functions. See 42 U.S.C. § 12101(a)(3).

The legislative history of the ADA shows that the vast majority of unconstitutional discrimination by the states related to the states in their role as public entities and providers of government services, not as employers. In *Garrett*, the Court concluded that the legislative history did not reflect a history and pattern of unconstitutional discrimination in *employment*, but at the same time acknowledged that the "overwhelming majority of these accounts [of discrimination in the legislative history] pertain to alleged discrimination by the states in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Garrett*, 531 U.S. at 371-72 & n.7. The strength of this legislative history is evidenced by Congress's specific findings of persistent discrimination in the provision of public services and programs. 42 U.S.C. § 12101(a)(3), (5) – (9). Therefore, while the legislative history of the ADA proved fatal to a claim for damages against the state under Title I, that same history fully supports valid abrogation of Eleventh Amendment immunity under Title II.

Importantly, and perhaps most significantly, the constitutional rights encompassed by Title II are entitled to greater protection than those protected by Title I. While Title I protects against employment discrimination against a non-suspect class, Title II prevents discrimination against individuals with disabilities in "the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Specifically, Title II was enacted to address Congress's explicit finding that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health

services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). Title II thus helps ensure that individuals with disabilities have the same equal access to their government as all other citizens, a fundamental principal embodied by the equal protection clause: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Title II is also intended to enforce the Due Process Clause, which in turn incorporates most of the guarantees of the Bill of Rights and encompasses state conduct subject to constitutional limitations embodied in the First, Fourth, Fifth, Seventh, and Eighth Amendments. *See Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968). Consequently, Title II extends to areas of fundamental rights and liberties such as the right to vote, to petition government officials, to receive adequate custodial treatment, to have access to the courts and to education, to marry, to have custody of one's children, and to procreate. *See* 42 US.C. § 12101(a)(3).

Where fundamental rights and liberties are involved, state discrimination is subjected to strict scrutiny, *see Clark* v. *Jeter*, 486 U.S. 456, 461 (1988), and must be justified with a compelling state interest. *See Olmstead* v. *Zimring*, 527 U.S. 581 (1999) (right to be free from unreasonable confinement); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (right to marry); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (right to custody of one's children); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (right to procreate); *cf. Garrett* 531 U.S. at 373 (describing the Voting Rights Act of 1965 as a valid exercise of Congress's power under § 2 of the Fifteenth Amendment). Because only a compelling state interest could justify state discrimination of the kind

forbidden by Title II, Congress properly exercised its authority under the Fourteenth Amendment to abrogate Eleventh Amendment immunity for such conduct. The reasoning that sustained the Court's decision in *Garrett* does not apply to Title II.

II. FOR LEGISLATION INTENDED TO PROTECT AGAINST CONSTITUTIONAL VIOLATIONS INVOKING HEIGHTENED SCRUTINY, THE COURT SHOULD APPLY THE RATIONAL MEANS TEST ENUNCIATED IN *M'CULLOCH* V. *MARYLAND*.

It is only in the context of state discrimination subject to rational basis review that the Court has created and applied the congruence and proportionality analysis.[2] Prior to *City of Boerne*, when reviewing § 5 legislation, the Court applied the rational means test enunciated in *M'Culloch* v. *Maryland*.[3]

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[2] For reasons discussed in Part IV, *amici* urge the Court to abandon altogether the congruence and proportionality analysis it has applied in recent cases analyzing § 5 legislation. *Amici* find this framework particularly inappropriate, however, where fundamental rights and liberties such as voting, access to the courts, and the right to raise one's children are involved because state discrimination in these areas is presumptively unconstitutional. Accordingly, the concerns that motivated the *Garrett* Court's searching inquiry into whether Title I enforces the Fourteenth Amendment or expands its substantive guarantees do not exist when Congress exercises its powers to address the effects of discrimination that receive heightened scrutiny.

[3] Although the Court, in *dicta*, used the words "congruence" and "proportional" in reviewing the Violence Against Women Act, *see United States* v. *Morrison*, 529 U.S. 598 (2000), the holding in *Morrison* was that the VAWA was unconstitutional because it was directed not "at any State or state actor, but at individuals who . . . committed criminal acts motivated by gender bias." *Id.* at 626.

The *M'Culloch* standard requires only a rational relationship between the ends of the legislation and Congress's chosen means. In the words of Chief Justice Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional.

M'Culloch, 4 Wheat (17 U.S.) 316, 421. Under this test, the desirability of the legislation as a policy matter, or the extent to which Congress might have chosen other, more narrowly tailored means, is beyond the scope of the Court's review. All that the Court need determine is whether the legislation is a rational means of enforcing the Fourteenth Amendment's substantive guarantees.

In applying the rational means test to the present case, there can be no doubt that Congress intended to address what it found to be a pattern of discrimination by the states against individuals with disabilities. For all the reasons discussed in Part III, Title II is a rational means for addressing this problem. Although, as discussed below, Title II is also a congruent and proportional means of addressing this discrimination, the Court need not conduct that more exacting analysis because, in the context of fundamental rights, state discrimination is presumptively unconstitutional and Congress's means of addressing that discrimination need only be rational.

III. UNDER THE ANALYSIS SET FORTH BY THE MAJORITY OF THIS COURT IN *GARRETT*, TITLE II OF THE ADA IS APPROPRIATE LEGISLATION UNDER § 5 OF THE FOURTEENTH AMENDMENT

Assuming the Court departs from the well-established standards in *M'Culloch*, Title II is nevertheless a congruent and proportional response to the states' documented history of discrimination against individuals with disabilities. Under the framework set out in *Garrett*, after determining that Congress unequivocally expressed its intent to abrogate the states' immunity, a court turns to whether Congress properly exercised its power to abrogate.[4] First, the Court must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, the Court must ask "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the states." *Id.* at 368. Last, the Court must determine whether the legislation is congruent and proportional to the identified wrong.

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[4] The first two steps of this analysis inquire into whether Congress explicitly expressed its intent to abrogate the states' Eleventh Amendment immunity and whether Congress acted pursuant to a valid exercise of power. *See Kimel*, 528 U.S. at 73; *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996) There is no dispute in this case that both of these criteria have been met. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of this chapter."); 42 U.S.C. § 12101(b)(4) (ADA enacted pursuant to both the Commerce Clause and § 5 of the Fourteenth Amendment).

A. Title II Is Intended to Guarantee Individuals with Disabilities Equal Opportunity to Obtain Vital Services and to Exercise Fundamental Rights and Liberties and to Protect Them from Violations of the Due Process Clause and the First, Fourth, Fifth, Seventh, and Eighth Amendments.

The majority in *Garrett* instructed that a court must "identify with some precision the scope of the constitutional right at issue" and define the "metes and bounds" of that right. *Garrett*, 531 U.S. at 365-68. In *Garrett*, the Court determined that Title I of the ADA was intended to remedy violations of the Equal Protection Clause. Because Title I extends only to an employment relationship and disability is not a quasi-suspect classification, the Court held that as Equal Protection legislation, Title I triggered only a rational basis review. *See id.* at 365-68; *see also City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-46 (1985) .

As discussed in Parts I and II above, however, Title II is also intended to prohibit and remedy violations of the Due Process Clause and infringement by the government of the fundamental rights and liberties of individuals with disabilities. These fundamental rights and liberties include the right to vote, to access the courts and the government process, to bear children, to have custody of one's children, to marry, and to be free from unreasonable confinement. Discrimination such as a state's refusal to provide reasonable access to the courts for individuals with disabilities not only constitutes actionable discrimination under Title II, but it plainly prevents an individual with a disability from exercising her fundamental constitutional rights.

For example, the Sixth Circuit has held that a claim under Title II of the ADA by a hearing-impaired individual

claiming to be excluded from participation in a child custody hearing by the state's failure to provide reasonable accommodations to his disability was essentially a Due Process Claim. *See Popovich* v. *Cuyahoga County Court*, 276 F.3d 808 (CA6 2002), *cert. denied,* 123 S.Ct. 72 (U.S. Oct. 7, 2002). As the matter involved the determination of parental rights, the *en banc* court concluded that heightened scrutiny should apply. *See also LaFaut* v. *Smith*, 834 F.2d 389, 389-95 (CA4 1987) (Powell, J., sitting by designation) (state's failure to provide accessible toilets could result in a violation of the Eighth Amendment); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) ("[A]n accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."); *Youngberg* v. *Romeo*, 457 U.S. 307, 309-10 (1982). Accordingly, much of the conduct sought to be prevented by Title II is presumptively unconstitutional discrimination.[5]

B. Congress Supported Title II of the ADA With Specific Findings Concerning the Pervasiveness of State Discrimination Against Individuals with Disabilities in the Provision of Programs and Services

Having determined the scope of the constitutional rights at issue, *Garrett* directs this Court next to consider whether Congress enacted Title II of the ADA in light of a history and pattern of unconstitutional discrimination by the states against people with disabilities.[6] *Garrett*, 531 U.S.

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[5] Even if the Court were to find that strict scrutiny should not apply and instead conduct a *Garrett* analysis, *amici* believe that the legislation is congruent and proportional for the reasons expressed *infra*, in Section III(C).

[6] The *Garrett* Court expressly declined to address whether Congress identified such a history and pattern of unconstitutional state discrimination against persons with disabilities in the provision of public

356, 368. Rather than relying on the *Garrett* Court's review of the legislative record, the Court should perform an independent analysis to determine the constitutionality of Title II. Such an analysis will reveal that Congress enacted Title II in response to a documented history of state discrimination against individuals with disabilities in the provision of programs and services.

In enacting the ADA, Congress recognized significant differences between employment discrimination, covered by Title I, and discrimination in the provision of government services, covered by Title II. Unlike discrimination in employment, a context in which Congress made no findings of discrimination against individuals with disabilities specific to the states, Congress made explicit findings of persistent discrimination in the provision of public services and programs. 42 U.S.C. § 12101(a)(3) ("discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"); *see also* 42 U.S.C. § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion; the discriminatory effects of architectural, transportation, and communication

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services, programs, and activities. *Garrett*, 531 U.S. at 360 n.1. Other courts have concluded that *Garrett* should not be interpreted as dispositive in the context of Title II. *See Robinson* v. *University of Akron Sch. of Law*, 307 F.3d 409, 410 (CA6 2002); *Popovich*, 276 F.3d at 818 (Moore, J., concurring); *Thompson* v. *Colorado*, 258 F.3d 1241, 1248 (CA10 2001); *Jones* v. *Pennsylvania*, 164 F. Supp. 2d 490, 493 (E.D. Pa. 2001). Indeed, the Court in *Garrett* observed that the "overwhelming majority of these accounts [of discrimination in the legislative history] pertain to alleged discrimination by the states in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Garrett*, 531 U.S. at 371-72 & n.7.

barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices"); *id.* § 12101(a)(6) ("census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally"); *id.* § 12101(a)(7) ("individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations . . . and relegated to a position of political powerlessness in our society"); *id.* § 12101(a)(8) ("the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency"); *id.* § 12101(a)(9) ("the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous").

These extensive findings reveal the degree to which Congress acted to remedy state discrimination against individuals with disabilities in the provision of government services. As a result, the inference required in *Garrett* to allow Title I to reach employment discrimination by states – that Congress, in making its general findings of historical employment discrimination against individuals with disabilities intended to remedy employment discrimination by *states* – is not required under Title II because Congress made express findings of discrimination against individuals with disabilities in the provision of government services. 42 U.S.C. § 12101(a)(3), (5) -(9); *cf. Garrett*, 531 U.S. at 368 (noting that the court must "examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the states against the disabled").

An independent review of the *entire* congressional record confirms that Congress met the requirement of legislating in response to invidious and widespread discrimination by the states against individuals with disabilities in the provision of government services, programs, and activities.[7] The Congressional Committee Reports conclude that state discrimination in the areas of public accommodations and public services reveal a "compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of . . . public accommodations [and] public services." H.R. REP. NO. 101-485, pt. 2, at 28 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 303, 310; *see also* S. REP. NO. 101-116, at 6 (1989). Thus, the lack of legislative evidence discussed so thoroughly with respect to Title I in *Garrett* is met in the context of Title II because ample Congressional evidence, compiled "after extensive review and analysis over a number of Congressional sessions," H.R. REP. NO. 101-485, pt. 2, at 28 (1990) , *reprinted in,* 1990

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[7] Congress held thirteen hearings and mobilized a special task force to examine whether the ADA would be appropriate legislation. *See Garrett*, 531 U.S. at 377 (Breyer, J., dissenting). The legislative record demonstrates that Congress identified numerous findings of unconstitutional discrimination by states falling under the ambit of Title II. *See* 42 U.S.C. § 12101(a)(2)-(a)(3), (a)(5)-(a)(6); H.R. REP. NO. 101-485, pt. 2, at 22, 30, 42 (1990) , *reprinted in,* 1990 U.S.C.C.A.N. 303, 310, 311-12, 324.

Although the *Garrett* Court refused to consider "unexamined, anecdotal accounts" of discrimination in the form of testimony presented to Congress, there are conflicting views regarding what materials the Court should consider in its examination of the congressional record. *See Wessel* v. *Glendening*, 306 F.3d 203, 210 (CA4 2002). The Court has considered testimony presented in congressional hearings in determining whether Congress has validly abrogated Eleventh Amendment immunity. *See City of Boerne*, 521 U.S. at 530-31.

U.S.C.C.A.N. 303, 310, reveals a pattern of state discrimination against individuals with disabilities in the area of public services.

Appendix C of the *Garrett* decision, as the majority in that decision acknowledged, cites hundreds of allegations of discrimination against individuals with disabilities falling under the ambit of Title II. *Garrett*, 531 U.S. at 372 n. 7. These submissions, made by individuals to the Task Force on Rights and Empowerment of Americans ("TFREA"), enabled Congress to identify over 150 instances of such discriminatory conduct by *state* actors, ranging from the denial of telephone access to deaf citizens to the denial of driver's and state professional licenses to individuals with disabilities. Moreover, these findings evidence a history and pattern of widespread discrimination, as many states were cited numerous times for continually committing similar violations, and a substantial number of these violations occurred nationwide. While the acts of state discrimination against individuals with disabilities identified by Congress may not appear, on their face, to be irrational, many of these acts implicate constitutional violations of the rights to travel and to vote. Based on the overwhelming and documented evidence, along with countless hours of testimony, Congress appropriately found that States have a history of discriminating against individuals with disabilities. *See* 42 U.S.C. § 12101(a)(3). *See also* S. REP. NO. 101-116 at 6 (1989).

C. Title II of the ADA Is Proportional and Congruent Because it Is Tailored to Remedy the Constitutional Violations Identified by Congress

Having identified the scope of the constitutional rights at issue and a Congressional finding of a pattern of

unconstitutional discrimination, the last inquiry is whether the legislation is congruent and proportional to the guarantees of the Fourteenth Amendment that the legislation is intended to protect. Because Congress has "wide latitude" in defining the bounds of § 1 through prophylactic and remedial legislation, *City of Boerne*, 521 U.S. at 520, congruence and proportionality does not require an exact match between that which is constitutionally prohibited. Rather, as noted in *Kimel*, the affirmative grant of legislative power contained in § 5 of the Fourteenth Amendment permits Congress to "remedy and deter" unconstitutional acts that violate § 1, as well as "prohibit[ ] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81 (citing *City of Boerne,* 521 U.S. at 518).

The Court should defer to Congress's findings and to Congress's determination that Title II of the ADA is an appropriate act of legislation in response to its findings. The Court has acknowledged that "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517) (alteration in original). Furthermore, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," and as such, "Congress must have wide latitude in determining where it lies." *City of Boerne*, 521 U.S. at 520.

Title II is congruent and proportional to the evils identified by Congress because it is tailored to remedy constitutional violations while placing the least burden possible on the state. First, the requirements placed on the states under Title II are narrowly tailored and sensitive to

financial and other burdens the requirements may place on the states. For example, Title II only requires a public entity to ensure that "when viewed in its entirety, [it] is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). It also does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(2). Moreover, except for new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3); *see also* 28 C.F.R. §§ 35.130(b)(7), 35.164; *Olmstead* v. *Zimring*, 527 U.S. 581, 606 n.16 (1999).

Second, states retain discretion to exclude persons from programs, services, or benefits for any lawful reasons unrelated to disability. A state is required only to make "reasonable modifications in policies, practices, and procedures" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *see also* 42 U.S.C. § 12131(2) (defining "qualified individual with a disability" as an individual "who, with or without *reasonable* modifications . . . , meets the essential eligibility requirements for the receipt of services") (emphasis added). Title II permits discrimination based on disability if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. § 12131(2). *See also Popovich* v. *Cuyahoga County Court*, 276 F.3d 808, 820 (CA6 2002) ("Title II requires reasonable modifications only when a disabled individual is otherwise eligible . . . . The states therefore maintain their discretion over the provision of public services so long as they do not arbitrarily discriminate against the disabled.") In determining the reasonableness of a modification, it is appropriate to consider

the resources of the state. *See Olmstead*, 527 U.S. at 592, 603-07.

"The appropriateness of remedial measures must be considered in light of the evil presented." *City of Boerne*, 521 U.S. at 530. Here, the evil presented includes infringement of the fundamental rights and liberties of individuals with disabilities; accordingly, Congress's power to prohibit discriminatory conduct is greater than in those cases involving discrimination only subject to rational basis review. The fact that a subset of discriminatory state conduct may be unreasonable under Title II, but rational under the Constitution is not fatal because "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Id.* at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)). Because Title II of the ADA is appropriately targeted to prohibit only unconstitutional discrimination by the states, and any constitutional conduct within its sweep is limited enough to meet the Court's criteria for congruence and proportionality, Congress acted within its power in abrogating the states' Eleventh Amendment immunity.

IV. THE COURT SHOULD RECONSIDER THE MORE RIGOROUS STANDARD OF REVIEW THAT IT HAS RECENTLY APPLIED TO § 5 LEGISLATION TO DETERMINE CONGRUENCE AND PROPORTIONALITY.

We have shown above that Title II meets the standard of review employed to determine congruence and proportionality in cases like *Kimel* and *Garrett* or that the standard does not apply to legislation, like the legislation

before the Court, aimed at assuring full participation by individuals with disabilities in the freedoms and privileges guaranteed by the First, Fourth, Fifth, Seventh, Eighth and Fourteenth Amendments. We also respectfully urge the Court, however, to reexamine the standard of review it has recently applied in cases such as *Kimel* and *Garrett* and to return to a more deferential standard in evaluating the validity of all legislation Congress seeks to enact under its § 5 powers.

In *City of Boerne* and subsequent cases, the Court has continued to recognize that it should defer to Congress's judgments and that "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517). Nevertheless, in applying the congruence and proportionality standard, the Court has closely scrutinized the legislative record for evidence of a "pattern" of unconstitutional state discrimination, has insisted that attempts to deal with such discrimination on a uniform, national basis be supported by evidence in the record, and has questioned the quality of the evidence that is reflected in the record and the inferences that Congress was entitled to draw from it.

Respectfully, we submit that this approach is inconsistent with the principle of separation of powers and unduly intrudes on Congress's legislative function. The Court has noted that

> [a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. Only by faithful adherence to this guiding principle . . . is it possible to

> preserve to the legislative branch its rightful independence and its ability to function.

FCC v. *Beach Communications*, 508 U.S. 307, 308, 315 (1993) (citations omitted). Yet, in determining congruence and proportionality in cases such as *Kimel* and *Garrett*, the Court has required that Congress indicate the "reasons for [its] action" in the legislative record and support those "reasons" with evidence of the necessity of § 5 legislation. *Kimel*, 528 U.S. at 88. The Court thus appears to have imposed an evidentiary standard more appropriate to an administrative agency than a coordinate branch of the Federal Government. *See Garrett*, 531 U.S. at 376 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.).

Moreover, the Court appears to have limited the inferences that Congress may draw through the use of common sense from the information it has received from multiple sources. For example, in *Garrett*, the Court held that substantial evidence of society-wide stereotypes concerning individuals with disabilities, and even discrimination by government officials of municipalities, did not provide a sufficient basis for Congress to infer that state officials were as likely to hold the same stereotypes and prejudices that affected or were likely to affect their treatment of individuals with disabilities. *See Garrett*, 531 U.S. at 377-78. And the requirement of a record showing a pattern of discriminatory state action also implies that Congress's power "to enforce" the Fourteenth Amendment limits it to legislation remedying past conduct that can be reflected in a record and precludes it from legislating prophylactically to protect against incipient or potential conduct that threatens to undermine the guarantees of the Fourteenth Amendment. *See* JOHN T. NOONAN, JR.,

NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 93 (2002).

With all respect, we believe that the Court's standard of review in these cases not only violates the separation of powers by imposing judicial requirements upon Congress's legislative procedure, but also reflects an unworkable view of the legislative process and, in effect, calls upon Congress to dramatically alter the way in which it legislates.

First, the Court's apparent requirement that Congress articulate a single, coherent policy rationale and support that rationale with evidence in the legislative record does not accord with the reality of the legislative process. Members of Congress represent constituencies with diverse, often conflicting, interests. Hence, legislation is rarely, if ever, reached through consensus, but rather, through competition and majority vote. *See* Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1741-45 (2002). Moreover, legislation is generally the product of a competitive process of bargaining and coalition-building as opposed to rational deliberation. Accordingly, in many, if not most, cases, no specific, identifiable rationale exists. *See id.* at 1744-45.

In addition, the Court's requirement of an evidentiary predicate in the legislative record mistakenly assumes that all the information upon which Congress draws in enacting legislation is incorporated in that record. Congress is informed through numerous sources that are not reflected in the legislative record. For example, Members of Congress bring to the legislature the views and experiences of the citizens whom they represent. Thus, unlike a trier of fact in a court or an administrative law judge, Congress is not a "*tabula rasa* until it conducts on-the-record proceedings," but

rather, "grounds its claim to legitimacy on knowledge of and accountability to the citizens it represents." A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328, 385-86 (2001). In addition, Congress acquires information from, *inter alia,* communications with interest groups, information support services such as the General Accounting Office and the Congressional Research Service of the Library of Congress, written materials from party leadership offices, members' caucuses, legislators' personal staffs, and communications with the executive branch. *See id.* at 384-87; Frickey & Smith, *supra*, at 1734-36.

Thus, among the branches of the Federal Government, Congress is uniquely capable of amassing information from a wide range of sources, both during and outside of its formal proceedings. Reliance on the legislative record alone is therefore an incomplete measure of the basis for Congress's judgments. More significantly, however, it appears that if Congress were to satisfy the congruence and proportionality test as applied in cases like *Kimel* and *Garrett*, it must painstakingly catalogue the information acquired from such extra-record sources in the legislative record. For the reasons discussed above, this would mark a dramatic alteration of Congress's legislative procedure.

Furthermore, by requiring Congress to adhere to judicially imposed procedural requirements when it legislates, the Court's application of the congruence and proportionality test conflicts with at least the spirit of a number of constitutional provisions that limit judicial intrusion into the legislative sphere. These include the Rules and Journal Clauses of Article I, which provide, respectively, that "[e]ach House may determine the rules of its proceedings" and "shall keep a journal of its proceedings,

and from time to time publish the same, excepting such parts as may in their judgment require secrecy." U.S. Const. art. I, § 5, cls. 2, 3. The Court has interpreted both of these provisions as giving Congress wide discretion to determine how to report and record its consideration of legislation. *See, e.g.*, *United States* v. *Ballin*, 144 U.S. 1 (1892); *Field* v. *Clark*, 143 U.S. 649 (1892).

The more demanding standard of review applied in cases such as *Kimel* and *Garrett* also appears to conflict with the Speech or Debate Clause, which provides that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. The Court has determined that one of the Speech or Debate Clause's chief purposes is "to insure that the legislative function the Constitution allocates to Congress may be performed independently" and "reinforc[e] the separation of powers so deliberately established by the Founders." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). *See also Gravel* v. *United States*, 408 U.S. 606, 628-29 (1972) (holding that Speech or Debate Clause prohibited court from inquiring into conduct of, or preparation for, congressional proceeding); Bryant & Simeone, *supra*, at 376-83.

We understand the Court's approach, first articulated in *City of Boerne* and applied in cases like *Kimel* and *Garrett*, to reflect two concerns: first, that in the absence of a judicially recognized history of state discrimination, Congress actually may be seeking to expand the substantive scope of the Fourteenth Amendment or may be adopting a remedy that is disproportionate to the number of instances of unconstitutional state conduct; and second, that in such circumstances, there is a need to protect the sovereignty of the states against unwarranted intrusions by Congress in the guise of enforcing the Fourteenth Amendment. We

respectfully submit that neither concern justifies the intrusion into the legislative process that application of the standard of review in cases like *Kimel* and *Garrett* has entailed.

In the absence of conduct involving a judicially recognized history of unconstitutional state action, this Court has limited itself to rational basis review in evaluating whether state conduct entails arbitrary and purposeful discrimination, in recognition of the Court's own fact-finding limitations and the deference due to democratically elected legislatures. But it is precisely because Congress, as a democratically elected legislature, is not so limited that it is inappropriate to impose a rigorous standard of judicial review on Congress's determination of the existence or a threat of unconstitutional state conduct, even if not previously recognized by the Court. *See Garrett*, 531 U.S. 356, 382-85 (opinion of Breyer, J., dissenting, joined by Stevens, Souter, and Ginsberg, JJ.); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 467-73 (2000). As discussed above, in making legislative judgments, Congress relies on many sources of information and intuition that would not support a judicial or administrative determination, but which are characteristic of a democratic legislative process. The Fourteenth Amendment expressly assigns to Congress the task of enforcing its guarantees and, under the long tradition established by *M'Culloch*, its judgments that there exists arbitrary and purposeful state discrimination requiring legislation, and what legislation is "appropriate" to enforce the Fourteenth Amendment's guarantees against such discrimination and its effects, deserve deference and respect.

We also submit that concerns that Congress may be unjustifiably intruding on state sovereignty do not support a more rigorous standard of review of Congress's legislative

judgments under § 5. To begin with, as the Court has recognized, the Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-56 (1976) (noting that the Amendments effected "the expansion of Congress's powers with the corresponding diminution of state sovereignty") (discussing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)). Moreover, the states are not an isolated minority requiring heightened judicial protection against a tyrannical majority. To the contrary, the political process and the structure of the Federal Government – in particular, the states' equal representation in the Senate – were the principal means intended by the Framers to prevent inappropriate intrusions by the federal legislature on the states' sovereignty. *See Kimel*, 528 U.S. at 93-94 (opinion of Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

The standard recently applied by the Court to determine congruence and proportionality substitutes the Court's views of how Congress should conduct its lawmaking processes in carrying out its duty to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," U.S. CONST. amend. XIV, § 5, and ultimately substitutes the Court's judgment for that traditionally left to Congress alone as to the "closeness of the relationship between the means [to be] adopted and the end to be attained." *Burroughs* v. *United States*, 290 U.S. 534, 548 (1934). This is a departure from the Court's historic recognition of its own institutional limitations and the deference due to the democratically elected legislative branch, except in cases where the Court's intervention is needed to protect the rights of individuals guaranteed by the Constitution and those "discrete and insular minorities" who do not have access to the democratic process to protect their

rights against a dominant majority. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). Accordingly, for the reasons discussed above, *amici curiae* respectfully urge the Court to reconsider the rigorous standard of review it has recently applied to determine congruence and proportionality, even in cases where the Court has not previously recognized a history of purposeful unequal treatment.

V. CONCLUSION

For the foregoing reasons, the Lawyers' Committee for Civil Rights Under Law, the National Asian Pacific American Legal Consortium, the National Association for the Advancement of Colored People, and the Puerto Rican Legal Defense Fund, as *amici curiae*, urge the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit.

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MEDICAL BOARD OF CALIFORNIA,
Petitioner,
v.
MICHAEL J. HASON,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, ET AL., *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Reno v. Flores, 507 U.S. 292 (1993) 4

Reynolds v. Sims,
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Robinson v. Kansas,
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Ruiz v. Estelle,
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aff'd, 679 F.2d 1115 (5th Cir. 1982).....28, 29

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).....15

Skinner v. Oklahoma,
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Society for Good Will to Retarded Children v. Cuomo, 745 F. Supp. 879 (E.D.N.Y. 1990).....25

Stanley v. Illinois,
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State v. Spivey,
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In re Sterilization of Moore,
221 S.E.2d 307 (N.C. 1976).....18

Stump v. Sparkman,
435 U.S. 349 (1978).....19

T.E.P. v. Leavitt,
840 F. Supp. 110 (D. Utah 1993).....21

Thomas S. v. Morrow,
781 F.2d 367 (4th Cir. 1986) 26

Tolbert v. McGriff,
434 F. Supp. 682 (M.D. Ala. 1977) 15

Troxel v. Granville,
530 U.S. 57 (2000).....21

Turner Broadcasting System v. FCC,
520 U.S. 180 (1997).....6

Weems v. United States,
217 U.S. 349 (1910).....27

Wisconsin v. Yoder,
406 U.S. 205 (1972).....21

In re Wiseman's Appeal,
32 Pa. D. & C. 3d 294, 1983 Pa. D. & C. LEXIS
69 (C.P. 1983).....15

Wyatt v. Rogers,
985 F. Supp. 1356 (M.D. Ala. 1997).....24

Wyatt v. Stickney,
344 F. Supp. 387 (M.D. Ala. 1972),
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Yarbaugh v. Roach,
736 F. Supp. 318 (D.D.C. 1990).....29

Youngberg v. Romeo,
457 U.S. 307 (1982).....23

Zablocki v. Redhail,
434 U.S. 374 (1978).....20

STATUTES

20 U.S.C. § 1400(b).....16

42 U.S.C. § 12101(a).....4, 5, 6, 7, 17, 23

42 U.S.C. § 12101(b).....4

42 U.S.C. § 12131 3

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ALA. CODE § 12-16-60 (1995).....14

ALASKA CONST. art. 5, § 2 (2000) 8

ARK. CODE ANN. § 16-31-102 (1987),
amended, 1994 Ark. Acts No. 4, § 6 (1994).....14

ARK. CONST. AMEND. 51, § 11(a)(6)(2001) 8

ARK. CONST. art. 3, § 5 (1987) 8

CAL. CIV. CODE § 4201 (1987).....20

CONN. GEN. STAT. § 8-3f (2001) 30

D.C. CODE ANN. § 30-103 (1981) 20

D.C. CODE ANN. § 46-403 (2001) 21

DEL. CODE ANN. tit. 15, § 1701 (1999) 8

DEL. CODE ANN. tit. 22, § 309 (2002) 30

DEL. CONST. art. 5, § 2 (Supp. 2000) 8

DEL. CONST. art. 10, § 1 (1975) 16

HAW. CONST. art. 2, § 2 (1997) 8

IND. CODE § 22-1601 (1950) 19

IOWA CODE ANN. § 595.3 (1990) 20

IOWA CONST. art. 2, § 5 (2000) 8

KAN. CONST. art. 5, § 2 (1988) 8

KY. CONST. § 145(3) (2002) 8

KY. REV. STAT. § 116.025(1) (1997) 8

KY. REV. STAT. § 387.590 (1984) 8

MASS. ANN. LAWS ch. 51, § 1 (1991) 8

MASS. ANN. LAWS CONST. AMEND art. 3 (2002) 8

MD. CODE ANN., CTS. & JUD. PROC. § 8-207 (2002) 14

MD. CODE ANN. ELEC. § 3-102(b)(2) (2002) 8

MD. CONST. art. 1, § 4 (1981) 8

MICH. COMP. LAWS § 551.6 (1990) 20

MISS. CODE ANN. § 41-21-45 (1990) 20

MISS. CODE ANN. § 41-45-1 (1999).....19

MISS. CODE ANN. § 41-45-9 (1999).....19

MISS. CODE ANN. § 23-15-11 (1999).....8

MISS. CODE ANN. § 93-1-5 (1999).....21

MISS. CONST. art. 12, § 241 (1999) 8

MONT. CODE ANN. § 13-1-111(3) (1999).....8

MONT. CONST. art. 4, § 2 (2001).....8

N.J. CONST. art. 2 § 6 (Supp. 1999).....8

N.J. STAT. ANN. § 2B:201 (2002).....14

N.J. STAT. ANN. § 19:4-1(1) (2001) 8

NEB. REV. STAT. ANN. § 32-313(1) (Michie. 2000).....8

NEB. CONST. art. 6, § 2 (2001).....8

NEV. CONST. art. 2, § 1 (1998) 8

N.M. CONST. art. 7, § 1 (1992).....8

N.M. STAT. ANN. § 1-1-4 (Michie 1995).....8

OHIO CONST. art. 5, § 6 (1994) 8

PA. STAT. ANN. tit. 48, § 1-5 (West 1990) 20

R.I. CONST. art. 2, § 1 (2002).....8

R.I. GEN. LAWS § 15-1-5 (1988).....20

TENN. CODE ANN. § 36-3-109 (2001).....21

UTAH CODE ANN. § 30-1-2(1) (1987).....21

VT. CONST. Ch. 2, § 42 (1996).....8

VT. STAT. ANN. tit. 15, § 512 (1989).....20

VT. STAT. ANN. tit. 15, § 514 (1989).....20

VT. STAT. ANN. tit. 24, § 4409(f) (2002).....30

W. VA. CODE § 48-2-2 (1990).....20

WYO. STAT. § 1-11-101 (2002).....14

OTHER AUTHORITIES

Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (June 2002).....28

Sharon P. Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997).....27

GAO, *Mental Health: Improper Restraint or Seclusion Use Places People at Risk* (Sept. 1999).....24

Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, Harv. L. Rev. 1202 (1990).....22

Judicial Council of California, *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* (Jan. 1997).....13

N.Y. State Commission on Quality of Care for the Mentally Disabled, *Survey of Access to New York State Courts For Individuals With Disabilities* (June 1994).....13

Price & Burt, *Sterilization, State Action and the Concept of Consent*, 1 L. & Psych. Rev. 57 (1978).....19

Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (1991).....18

Bruce Dennis Sales, et al., *Disabled Persons and the Law: State Legislative Issues* (Plenum Press 1982).....20

D. Schein, *At Home Among Strangers* (1989).....26

Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*.....8, 9

United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983).....17, 26

INTEREST OF THE *AMICI CURIAE*

Amici curiae are twenty-four associations of people with disabilities and public interest groups that advocate for the rights of people with disabilities, including The American Association of People with Disabilities, The American Association on Mental Retardation, AARP, The American Council of the Blind, The American Diabetes Foundation, The American Network of Community Options and Resources, The American Occupational Therapy Association, The Anti-Defamation League, The Arc of the United States, The Association on Higher Education and Disability, The Bazelon Center for Mental Health Law, The Brain Injury Association of America, The Epilepsy Foundation®, Lambda Legal Defense and Education Fund, Inc., The National Alliance For The Mentally Ill, The National Association for Rights Protection and Advocacy, The National Health Law Program, The National Mental Health Association, The National Senior Citizens Law Center, The National Spinal Cord Injury Association, The Polio Society, Self Help for Hard of Hearing People, TASH, and The Women and AIDS Clinic of Rutgers University School of Law. These organizations, the interests of which are described in more detail in the Appendix, wish to ensure that this Court is fully apprised of the extensive evidence of the States' patterns of unconstitutional treatment of people with disabilities supporting Congress' abrogation of Eleventh Amendment immunity for violations of Title II of the Americans with Disabilities Act ("ADA").[1]

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[1] Petitioner, Respondent, and the United States have consented to the filing of this brief. Counsel for *amici* authored the entire brief. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

For far too long, States have systematically subjected Americans with a broad range of physical or mental disabilities to deplorable and unconstitutional treatment – including deprivations of their most fundamental constitutional rights. When Congress enacted Title II of the ADA, there was ample evidence that States were unconstitutionally excluding people with disabilities from voting and from accessing our judicial system, prohibiting them from marrying and raising families, warehousing them in institutions with deplorable conditions, and otherwise systematically, irrationally, and intentionally depriving them of the rights guaranteed by the Fourteenth Amendment. Unfortunately, regular instances of such unconstitutional State behavior persist even today.

Amici understand that Respondent's brief will detail the extensive evidence of State-sponsored unconstitutional treatment of people with disabilities contained in Congress' legislative record. This brief, therefore, describes the compelling record of State unconstitutional conduct found in judicial decisions and the public record. The examples in this brief, although necessarily limited by space constraints, confirm what is also plain in Congress' specific statutory findings and in the legislative history: Congress properly exercised its power under § 5 of the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity for violations of Title II of the ADA.

ARGUMENT

I. THE CONSTITUTIONAL RIGHTS AT ISSUE IN TITLE II ARE SIGNIFICANTLY BROADER THAN THOSE IMPLICATED IN TITLE I

The "first step" in analyzing the constitutionality of Congress' abrogation of the Eleventh Amendment with respect to Title II "is to identify with some precision" the

scope of the constitutional right at issue. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365 (2001). The constitutional rights at issue for Title II are different, and significantly broader, than they were for the Title I issue that the Court analyzed in *Garrett*. Title I encompasses only discrimination in employment. Title II, in contrast, is directly applicable to States, and it encompasses a broad range of State conduct in the provision of public services and benefits.[2]

When this Court assessed the "scope of the constitutional right at issue" under Title I in *Garrett*, it found that State discrimination against people with disabilities in employment matters is constitutional unless the State's action lacks a rational basis. *Id.* at 365-67 (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)). The Court recognized, however, that a separate analysis of the scope of the constitutional right at issue would be appropriate under Title II. *Id.* at 360 (stating that Title II "has somewhat different remedial provisions" than Title I and declining to address whether Congress validly abrogated the States' Eleventh Amendment immunity when it enacted Title II).

The Fourteenth Amendment's due process provision encompasses and makes applicable to the States the various other affirmative provisions of the Bill of Rights. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)); *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992). Many of those due process rights – to vote, to access the courts, and

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[2] Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "[P]ublic entit[ies]" include States and State instrumentalities and agencies. *Id.* § 12131(1)(A).

the like – come within the sphere of conduct regulated by Title II and are explicitly referenced in Congress' statutory findings to the ADA. *See* 42 U.S.C. §§ 12101(a). And, Congress plainly intended to evoke the "sweep of Congressional authority, including the power to enforce the Fourteenth Amendment" when it enacted the ADA. *Id.* § 12101(b)(4). Accordingly, in addition to the type of equal protection/rational basis claims at issue in *Garrett* and *City of Cleburne*, the "history and pattern" of state-sponsored unconstitutional behavior that Congress examined in enacting Title II properly "encompasse[d] various due process-type claims with varying standards of liability." *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 813 (6th Cir.), *cert. denied*, 123 S. Ct. 72 (2002).

Assessment of many of the due process and equal protection-type violations encompassed within Title II requires heightened scrutiny because, in contrast to the discriminatory employment practices at issue in *Garrett*, those violations involve people with disabilities exercising fundamental constitutional rights. When a due process claim involves a right that this Court has deemed fundamental, it is well settled that the Fourteenth Amendment's due process clause includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (emphasis in original); *City of Cleburne*, 473 U.S. at 440 (strict scrutiny justified "when state laws impinge on personal rights protected by the Constitution"). It is equally well settled that when differential State treatment challenged under the equal protection clause impinges on a fundamental constitutional right, the discrimination is assessed under a strict scrutiny, not a rational basis, standard. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Accordingly, the "history and pattern" of State-sponsored discrimination underlying Title II includes not only irrational differential treatment of people with disabilities – although there is plenty of that conduct to be found – but also unconstitutional State conduct with respect to people with disabilities and their fundamental constitutional rights. California's suggestion that Congress' inquiry was limited to examples of invidious State discrimination without a rational basis (Pet. Br. at 9-10, 11, 17) is thus incorrect.

II. CONGRESS' SPECIFIC FINDINGS OF STATES' UNCONSTITUTIONAL DISCRIMINATION ARE CONFIRMED BY THE JUDICIAL RECORD

The second part of this Court's *Garrett* analysis asks whether Congress enacted Title II in response to "a history and pattern" of unconstitutional discrimination by the States. 531 U.S. at 368. In *Garrett*, the Court noted "strong evidence" that Congress' "failure to mention States in its legislative findings *addressing discrimination in employment* reflects that body's judgment that no pattern of unconstitutional state action had been documented." *Id.* at 372 (emphasis added).

Here, exactly the opposite is true: Congress' statutory findings are "strong evidence" that Congress could, and did, identify a pattern of unconstitutional State action in the areas that it addressed in Title II. Thus, Congress' findings explicitly and unambiguously encompass discrimination in ***public*** areas that are ***either largely or entirely within the purview of the States,*** as well as multiple areas that indisputably include state conduct. 42 U.S.C. § 12101(a)(3) (finding discrimination against individuals with disabilities persisted in "critical areas" like "education, transportation, . . . institutionalization, health services, voting, and access to public services"). Congress also specifically found that the discrimination at issue was ***irrational*** and, at times, ***intentional***, noting that individuals with disabilities

"continually" encounter discrimination that includes "outright intentional exclusion," that people with disabilities have been subjected to a "history of purposeful unequal treatment" resulting from "stereotypic assumptions," and describing the "continuing existence of *unfair* and *unnecessary* discrimination." *Id.* § 12101(a)(3), (5), (7), (9) (emphasis added). Based on these findings, Congress aimed Title II directly at State conduct. *Id.* § 12132(1)(A).

California's suggestion that the States were somehow "left out" of Congress' intended targets under Title II (Pet. Br. at 18-21) ignores Congress' findings and the text of Title II. Rather, Congress explicitly found pervasive, irrational, and intentional discrimination against people with disabilities in areas controlled by States, and it applied Title II directly to the States.

Congress' findings are entitled to substantial deference. *City of Boerne*, 521 U.S. at 536. Congress and the courts are co-equal actors with separate and different roles in our tri-partite system of government. Congress is uniquely suited to make determinations based on a wider and different set of information than that available to courts adjudicating specific cases. Judicial deference to Congress' determinations recognizes Congress' skill in performing its specifically legislative function. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997) ("We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.") (citations omitted).

Congress' findings of State-sponsored discrimination in areas encompassed by Title II are also amply supported by the ADA's legislative history – as detailed in Respondent's brief – and by the extensive examples from the judicial and public record described in Section III below. The Court need not limit its review to the specific legislative record, although that record is replete with examples of unconstitutional State

conduct in the areas encompassed by Title II. *Id.* at 200, 209, 211-13 (examining evidence outside the legislative record to evaluate Congress' exercise of legislative power). This brief provides a sampling of the judicial decisions and other public materials that demonstrate that States regularly deprived people with disabilities of their most fundamental constitutional rights. The Court can, and should, presume that Congress was aware of such decisions when it enacted Title II. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts should presume that Congress is aware of relevant legal precedents).[3]

III. THE STATES HAVE HISTORICALLY DEPRIVED AMERICANS WITH DISABILITIES OF THEIR CONSTITUTIONAL RIGHTS

A. Patterns of Unconstitutional State Conduct Involving The Fundamental Right to Vote

When it passed the ADA, Congress found persistent discrimination in the "critical" area of "voting." *See* 42 U.S.C. § 12101(a)(3). The fundamental right to vote is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Classifications infringing the ability to exercise the right to vote must be examined under strict scrutiny. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

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[3] Moreover, even the numerous judicial decisions finding unconstitutional State behavior do not reflect the pervasive nature of such conduct, in light of Congress' findings of invidious and persistent social and political segregation and isolation, and the resulting powerlessness, of people with disabilities. 42 U.S.C. § 12101(a)(2), (5), (6), (7). For instance, people with disabilities were and still are presented with difficult and often insurmountable barriers in accessing the very judicial system that exists to address their wrongs. *See infra* § III.B.

1. States Disenfranchise People With Disabilities

States have historically prevented Americans with mental disabilities from exercising their fundamental right to vote through a host of laws, many of which are still on the books. Forty-two States currently have laws disenfranchising Americans with mental disabilities in a variety of contexts.[4] *See Doe v. Rowe*, 156 F. Supp. 2d 35, 38 n. 2 (D. Me. 2001). Similar and more egregious laws were on the books when Congress enacted the ADA. Indeed, the concurring opinion in *City of Cleburne* had described them just five years before.

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[4] *See, e.g.*, Alaska (ALASKA CONST. art. V, § 2 (2000)) (persons of unsound mind); Arkansas (ARK. CONST. art. 3, § 5 (1987); *id.* amend. 51 § 11(a)(6) (2001)) (idiots or insane; adjudicated mentally incompetent); Delaware (DEL. CONST. art. 5, § 2 (Supp. 2000), DEL. CODE ANN. tit. 15 § 1701 (1999)) (idiot or insane); Hawaii (HAW. CONST. art. 2, § 2 (1997)) (*non compos mentis*); Iowa (IOWA CONST. art. 2, § 5 (2000)) (idiot or insane); Kansas (KAN. CONST. art. 5, § 2 (1988)) (mental illness); Kentucky (KY. CONST. § 145(3) (2002), KY. REV. STAT. §§ 116.025(1) (1993), 387.590 (1984)); Maryland (MD. CONST. art. 1, § 4 (1981), MD. CODE ANN., ELEC. § 3-102(b)(2) (2002)) (under care or guardianship for mental disability); Massachusetts (MASS. ANN. LAWS CONST. AMEND. art. 3 (2002); MASS. ANN. LAWS ch. 51, § 1 (1991)) (under guardianship); Mississippi (MISS. CONST. art. 12, § 241 (1999); MISS. CODE ANN. § 23-15-11 (1999)) (idiots and insane); Montana (MONT. CONST. art. 4, § 2 (2001), MONT. CODE ANN. § 13-1-111(3) (1999)) (adjudicated unsound mind unless finding reversed); Nebraska (NEB. CONST. Art. 6, § 2 (2001); NEB. REV. STAT. ANN. § 32-313(1) (Michie. 2000)) (*non compos mentis*); Nevada (NEV. CONST. art. 2, § 1 (1998)) (idiot or insane); New Jersey (N.J. CONST. art. 2 § 6 (Supp. 1999), N.J. STAT. ANN. § 19:4-1(1) (2001)) (idiot or insane); New Mexico (N.M. CONST. art. 7, § 1 (1992), N.M. STAT. ANN. § 1-1-4 (Michie 1995)) (idiots or insane); Ohio (OHIO CONST. art. 5, § 6 (1994)) (idiots or insane); Rhode Island (R.I. CONST. art. 2, § 1 (2002)) (adjudicated *non compos mentis*); Vermont (VT. CONST. Ch. 2, § 42 (1996)) (not quiet and peaceable). *See* Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. of Emp. & Lab. L. 437, 456 tbl. 2 (2000), for a chart describing these statutes.

473 U.S. at 464 (citing 1979 article finding that "most states still categorically disqualified 'idiots' from voting") (Marshall, J., concurring in part and dissenting in part).[5]

Such laws are unconstitutional when, factually or as applied, they categorically exclude people with disabilities from voting, without reference to individual competence. Such categorical exclusions do not satisfy any compelling State interest in protecting the integrity of the electoral process, much less provide the least restrictive means of doing so. Indeed, it is difficult to articulate how such laws meet even minimal standards of due process. One recent case overturning a fairly typical State disenfranchisement provision aptly illustrates the defects in such laws. In *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001), a Maine statute prohibiting individuals under guardianship for reason of "mental illness" from registering to vote or voting failed to pass constitutional muster on due process and equal protection grounds. The court applied strict scrutiny, and found that the State had "disenfranchised a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity." *Id.* at 52. The court also found the statute facially unconstitutional under the equal protection clause, because the State's insistence on looking to archaic categories such as "idiotic," "lunatic" and "unsoundness of mind" to determine who was excluded from voting based on mental illness permitted improper classifications and disenfranchised an overbroad class of individuals. *Id.* at 54-55. *See also, e.g., Manhattan State Citizens Group Inc. v. Bass*, 524 F. Supp. 1270 (S.D.N.Y. 1981) (New York statute prohibiting individuals involuntarily committed to mental institution from voting was unconstitutional as applied).

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[5] When Congress enacted the ADA, the American Bar Association had opined that most of these statutes were unconstitutional. *Id.* at 451.

2. States Deny Access To Voting Equipment and Polling Places

States have also discriminated by denying individuals with disabilities physical access to both polling places and voting machines. Although the cases in the area are generally decided on statutory rather than constitutional grounds, it is hard to imagine a compelling State interest in making it difficult or impossible for people with disabilities to exercise their fundamental right to vote, particularly when necessary modifications often come at a minimal cost. For example, in *National Organization on Disability v. Tartaglione*, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001), a group of plaintiffs with visual and mobility impairments brought suit against, among others, the Secretary of the Commonwealth of Pennsylvania, because the Secretary could, but had not, approved voting machines that would allow plaintiffs with visual impairments to participate fully in the voting process. *See also American Ass'n of People With Disabilities v. Smith*, 227 F. Supp. 2d 1276 (M.D. Fla. 2002) (declining to dismiss a suit against Florida officials where State officials certified machines which did not provide equal access to voters with disabilities); *Hill v. New York State Bd. of Elections*, 503 N.Y.S.2d 958 (N.Y. Sup. Ct. 1986) (State board of elections had continually permitted local entities to locate polling places in sites inaccessible to people with disabilities).

B. Patterns Of Unconstitutional State Interference With Equal And Effective Access To The Courts

1. States Exclude People With Disabilities From The Judicial Process As Litigants

States have historically denied persons with disabilities an equal opportunity to use the State courts as litigants by not providing interpreters or other necessities for effective communication, or by imposing architectural barriers that exclude persons with mobility or sensory impairments from using the court system. Such inaccessibility presents due

process issues when people with disabilities are unable effectively to access the judicial system, either in the criminal or civil context. For criminal defendants, the due process clause guarantees that an "accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). Parties in civil litigation have an analogous due process right to be present in the courtroom and to participate meaningfully in the process unless their exclusion furthers an important governmental interest. *See, e.g., Logan v. Zimmeman Brush Co.*, 455 U.S. 422, 429 (1982) ("[t]he Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances"); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (except in extraordinary circumstances, state must provide all civil litigants a meaningful opportunity to be heard).

Examples of exclusion from the judicial process in the civil arena are common. In *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.), *cert denied*, 123 S. Ct. 72 (2002), for instance, a person who was partially deaf alleged that the State court failed to provide him with adequate hearing assistance in his child custody case in violation of his equal protection and due process rights. The Sixth Circuit noted the fundamental nature of the rights at stake in parental custody hearings, and the procedural safeguards that this Court has repeatedly held are necessary in such hearings, including counsel for indigent defendants and free access to the trial records. *Id.* at 813-14 (citing *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 30 (1981); *Santowsky v. Kramer*, 455 U.S. 745, 769-70 (1982); *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996)). The court explained that "a state's failure to accommodate plaintiff's deafness may greatly increase the risk of error in the proceeding, precluding one side from responding to charges made by the opposing

party, an essential element of our adversary system." *Id.* at 815. Concluding that the suit raised "obvious due process problems," the Sixth Circuit remanded the case for retrial on the unreasonable exclusion claim.

In the criminal process, likewise, there are a number of cases in which authorities did not provide sufficient interpretation services, or otherwise effectively excluded people with disabilities from participating meaningfully in their court proceedings. In *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 123 S. Ct. 72 (2002), for instance, a class of prisoners with disabilities alleged that California failed to provide them adequate access to, and a meaningful opportunity to participate in, their parole hearings. The process depended "to a great extent" on written forms; prisoners and parolees with disabilities were "provided with inadequate accommodations to help them understand the content of those forms, and as a consequence some plaintiffs waived their rights to a hearing and others failed to invoke their rights on appeal." *Id.* at 857. The system did not provide American Sign Language interpretation services, Braille copies of documents, qualified readers, or staff capable of effectively communicating with prisoners and parolees with mental retardation or mental disabilities. *Id.* at 858 n.10. Affirming a lower court decision on ADA grounds, the Ninth Circuit held that the "minimal due process measures taken [by the defendant parole board] were insufficient to comply with the ADA or to enable plaintiffs properly to invoke or assert their rights." *Id.* at 862. And, there was no reasonable relation to any legitimate penological interest that could justify the impingement on the prisoners', and parolees', constitutional rights. *Id.* at 873-74.[6]

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[6] *See also People v. Rivera*, 480 N.Y.S.2d 426 (N.Y. Sup. Ct. 1984) (deprivation of due process where defendant with hearing impairment was

These kinds of problems, which prevent people with disabilities from effectively accessing the judicial system and vindicating their rights, remain all too common today. In 1997 for instance, the California Judicial Council concluded that many California court buildings were not accessible to persons with disabilities, lacked proper communications equipment, had insufficient interpreters, presented architectural barriers, and otherwise denied equal access to persons with disabilities.[7]

2. States Exclude People With Disabilities From The Judicial Process As Jurors

"Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others . . . than it may invidiously discriminate in the offering . . . of the elective franchise." *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970). "The harm from discriminatory jury selection . . . touch[es] the entire community." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). There is no compelling interest in, nor any rational basis for, excluding people with physical and mental disabilities from jury service without regard to their individual ability to

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sentenced as two time offender, and in earlier convictions, had been denied services of an interpreter); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1033 (S.D.N.Y. 1995) (failure to provide interpreters for inmates with hearing impairments for parole and disciplinary hearing violates due process).

[7] *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* 8-12 (Jan. 1997), available at www.courtinfo.ca.gov/reference/summarydisabilities.htm; *see also* N.Y. State Comm'n on Quality of Care for the Mentally Disabled, *Survey of Access to New York State Courts For Individuals With Disabilities* (June 1994) (only 8% of New York courts fully accessible to people with disabilities; "significant barriers" to access remain), available at www.cqc.ny.us/publications/pubcourt.htm.

function effectively as jurors. Nonetheless, when Congress passed the ADA, it was relatively common for State courts to refuse categorically to seat people with certain disabilities on juries.

Until 1994, for instance, Arkansas forbade people with "substantial impairments" to hearing or sight from participating as jurors. ARK. CODE ANN. § 16-31-102 (1987), *amended*, 1994 Ark. Acts No. 4, § 6 (1994).[8] The District of Columbia Superior Court continued to exclude all blind persons from jury service through 1993. *Galloway v. Superior Court*, 816 F. Supp. 12, 16-17 (D.D.C. 1993) (the "conclusion that blind jurors are not qualified appears based on exactly the archaic attitudes and unsubstantiated prejudices Congress wished to eradicate" with ADA). In *DeLong v. Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989), a judge serving on Pennsylvania's superior court testified that "he would disqualify a deaf person under all circumstances." In 1985, the Missouri Supreme Court permitted the categorical exclusion of "deaf, mute, deaf-mute, and blind persons from inclusion in the jury pool." *State v. Spivey*, 700 S.W.2d 812, 813-14 (Mo. 1985) ("We doubt that deaf persons have a community of attitudes or ideas."). Even today, a number of States have statutes that limit jury service to those who can "read," "write," or "speak" English, with no statutory exception for people who use American Sign Language or Braille – the same statutes that supported categorical exclusion of deaf and blind jurors in *Spivey* and *DeLong*. *See, e.g.*, ALA. CODE § 12-16-60 (1995); MD. CODE ANN., CTS. & JUD. PROC. § 8-207 (2002); N.J. STAT. ANN. § 2B:201 (2002), among others. *See also*

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[8] Copies of all non-current statutes cited in this brief are reproduced in the Appendix. The cited statutes are only exemplars, and do not purport to represent *all* the discriminatory statutes in a particular area.

WYO. STAT. § 1-11-101 (2002) (jurors "in possession of . . . natural facilities").

C. Patterns Of Unconstitutional State Discrimination Against People With Disabilities In Licensing

State governments regulate transportation and many areas of economic life through licensing programs. Historically, licensing programs have functioned to exclude some individuals with disabilities unfairly from certain activities. For decades, for instance, States denied individuals with physical or mental disabilities the privilege of obtaining or holding a driver's license regardless of whether they could meet or exceed state eligibility requirements, often causing the loss of a job. Such denials were frequently based on the mere unsubstantiated belief that individuals with disabilities like epilepsy or diabetes simply could not operate an automobile safely – violating these individuals' rights to due process. *See, e.g., In re Wiseman's Appeal*, 32 Pa. D. & C.3d 294, 1983 Pa. D. & C. LEXIS 69 (C.P. 1983) (regulation prohibiting individuals with epilepsy from driving unless seizure-free for one year violated due process; appellant, who had unblemished driving record and had one seizure during his lifetime, lost his license and his job as a truck driver); *Tolbert v. McGriff*, 434 F. Supp. 682 (M.D. Ala. 1977) (suspension of license without notice or hearing based on one seizure in fifteen years violated due process); *Jackson v. State*, 544 A.2d 291 (Me. 1988) (State denied applicant opportunity to receive a bus driver endorsement based on his insulin-dependent diabetes even though he had never missed work or been hospitalized).

D. Patterns of Unconstitutional State Discrimination In Education

"[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). It is plainly an equal protection violation for States to exclude children with disabilities from

public education entirely. *See San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (distinguishing "absolute denial" of education from inequalities in funding). States nevertheless have historically discriminated against people with disabilities by excluding them from educational opportunities, and this pattern continues to the present day.

Earlier in the last century, a number of States categorically excluded children with disabilities from public education. *See, e.g.*, DEL. CONST. art. 10 § 1 (1975) (establishing free public schools for all children *except* those who were "physically or mentally disabled"). When Congress enacted the Education of All Handicapped Children Act ("EHA") in 1975, it compiled an extensive record that States simply did not educate children with disabilities. Based on this record, Congress found that one million children were "*excluded entirely*" from the public school system, and "more than half" of the 8 million children with disabilities did not receive appropriate educational services. 20 U.S.C. § 1400(b) (emphasis added).

Judicial decisions confirm Congress' conclusion. In *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), for instance, students with mental retardation charged that Pennsylvania statutes excluded them from schools. The court found that the plaintiffs had articulated equal protection and due process claims under the rational basis test. *See also Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) (due process violation when defendant excluded students with disabilities from public education). Congress considered these cases and others like them when it enacted the EHA. *See Honig v. Doe*, 484 U.S. 305, 310 (1988) ("by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States"). Even when unconstitutional statutory schemes were remedied, States continued to violate the equal protection clause by excluding

students with disabilities from educational opportunities. *See, e.g., Panitch v. Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977).

These constitutional violations continued when Congress enacted the ADA, fifteen years later. In fact, Congress relied upon a Civil Rights Commission Report finding that, notwithstanding the EHA, "a great many handicapped children continue to be excluded from the public schools."[9] Congress found, therefore, that States still were discriminating against children with disabilities in the "critical area" of "education." 42 U.S.C. § 12101(a)(3). Unfortunately, instances of unconstitutional State exclusion persist even today. *See, e.g., Robinson v. Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000) (students with disabilities stated actionable due process and equal protection claims alleging inadequate school funding), *aff'd*, 295 F.3d 1183 (10th Cir. 2002).

E. Patterns Of State Interference With The Fundamental Right To Marry And Form Families

1. States Sterilize Persons With Disabilities

The Court has repeatedly recognized an individual's fundamental right to control his or her ability to procreate "free from unwarranted governmental intrusion." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The Court has also recognized a fundamental right to bodily integrity under the Fourteenth Amendment's due process clause. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990). Limitations on this fundamental right are subject to strict scrutiny. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-86 (1977).

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[9] United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 29 (1983) ("*Accommodating the Spectrum*").

The States share a long and shameful pattern of depriving Americans with disabilities the right and ability to procreate. Earlier in the last century, most States had laws authorizing involuntary sterilization of persons with disabilities.[10] Some of those laws were still in force when Congress enacted the ADA, although commentators generally had long concluded that "compulsory sterilization laws, no matter what their rationale, [we]re unconstitutional in the absence of evidence that compulsory sterilization [wa]s the only remedy available to further a compelling governmental interest."[11] In 1991, for instance, an Arkansas court overturned a State statute authorizing sterilization of "mentally deficient persons" without provision for notice, right of representation, right of hearing, and judicial oversight of sterilization decision as violative of due process. *McKinney v. McKinney*, 805 S.W.2d 66 (Ark. 1991). *See also Motes v Hall County Dep't of Family & Children Serv.*, 306 S.E.2d 260, 261-62 (Ga. 1983) (Georgia statute authorizing sterilization on "legal preponderance" of evidence did not meet constitutional requirements, because due process requires "clear and convincing evidence").[12] In 1981, former patients of Virginia institutions who were involuntary sterilized under a 1924 statute articulated a continuing constitutional violation, based on the State's continuing failure to *notify* them that they had been involuntarily sterilized – causing them to suffer

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[10] *See generally* Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* 45-55 (1991).

[11] *See In re A.W.*, 637 P.2d 366, 368-69 (Colo. 1981) (citing Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977), and others).

[12] Moreover, in the decades immediately before the ADA, State courts still were *upholding* sterilization statutes, citing the infamous decision in *Buck v. Bell*, 274 U.S. 200 (1927). *See, e.g., In re Sterilization of Moore*, 221 S.E.2d 307 (N.C. 1976); *Cook v. State*, 495 P.2d 768 (Or. 1972).

"medical, emotional, and mental problems, arising in large part from unsuccessful and uninformed attempts to deal with their infertility." *Poe v. Lynchburg Training Sch. & Hosp.*, 518 F. Supp. 789, 793 (W.D. Va. 1981).

Even after compulsory sterilization statutes were repealed, some States enacted statutes that allowed sterilization on the consent of the superintendent of a custodial care institution or a guardian.[13] Sterilization on the basis of substituted consent still involves State action threatening the fundamental right of procreation.[14] Relying on substituted consent, courts have permitted third persons to consent to sterilizations in circumstances in which the facts indicate that no compelling interest was at stake. *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978) (15 year old girl with mild retardation sterilized involuntarily after judge approved, *ex parte*, her mother's petition, without notice to the daughter or appointment of a guardian *ad litem*, although the daughter attended public school and had been promoted each year with her class); *Downs v. Sawtelle*, 574 F.2d 1, 5

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[13] Price & Burt, *Sterilization, State Action and the Concept of Consent*, 1 L. & Psych. Rev. 57 (1978). *E.g.*, MISS. CODE ANN. §§ 41-45-1, 41-45-9 (1999) (sterilization of "insane, idiotic, imbecile or feeble-minded" person who "by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted," upon petition of director of State institution after hearing); IND. CODE § 22-1601 (1950).

[14] One commentator has noted that the use of substituted consent in the sterilization context is "a fiction which authorizes the state to intervene because a party other than the subject provides the green light'" Price & Burt, *supra* note 13, at 58-60. *See also, e.g., In re A.W.*, 637 P.2d at 370 ("consent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children. The inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights.").

(1st Cir. 1978) (21 year old woman who was deaf and mute sterilized with consent of her guardian based on doctor's report recommending the operation "based 90% on this girl's low mentality involving poor judgment and her lack of restraint on sex appetite and its consequences").

2. States Prohibit The Marriage of People With Disabilities

Marriage is one of the "basic civil rights of man," *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), so the right to marry has long been considered fundamental, *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). State laws restricting the right of a class of persons to marry are unconstitutional unless the State can show a compelling interest. *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978).

Nevertheless, numerous State statutes historically and categorically restricted the right of persons with disabilities to marry, without a determination of individual capacity, in a manner that cannot withstand strict scrutiny. Many States maintained such restrictive statutes through the enactment of the ADA.[15] Just five years before Congress enacted Title II, for instance, this Court noted in *City of Cleburne* that it was

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[15] CAL. CIV. CODE § 4201 (1987) ("imbecile"; "insane"); D.C. CODE ANN. § 30-103 (1981) ("idiot"; "lunatic"); IOWA CODE ANN. § 595.3 (1990) ("a mental retardate"; "mentally ill"); MICH. COMP. LAWS § 551.6 (1988) ("feebleminded"; "imbecile"; "insane"); MISS. CODE ANN. § 41-21-45 (1990) (unlawful to cohabit with "feebleminded" female); PA. STAT. ANN. tit. 48, § 1-5 (WEST 1990) ("weak-minded"; "insane"); R.I. GEN. LAWS § 15-1-5 (1988) ("idiot"; "lunatic"); VT. STAT. ANN. tit. 15, § 514 (1989) ("idiot"; "lunatic"); *id.* tit. 15, § 512 (1989) ("physically incapable"); W. VA. CODE § 48-2-2 (1990) ("insane"; "idiot"; "imbecile") (copies included in Appendix). *See* Bruce Dennis Sales, et al., *Disabled Persons and the Law: State Legislative Issues* 16-20 (Plenum Press 1982) (as of 1980, 42 States and the District of Columbia had statutes restricting marriage for persons with disabilities).

still a criminal offense in several states for people with mental retardation to marry. 473 U.S. at 463 & note 12.

Some statutes discriminating against persons with disabilities in the right to marry are still on the books. TENN. CODE ANN. § 36-3-109 (2001), for instance, forbids issue of a marriage license "when it appears that the applicants or either of them is at the time drunk, insane or an imbecile." *See also* MISS. CODE ANN. § 93-1-5 (1999) (same); D.C. CODE ANN. § 46-403 (2001) (marriage of "an idiot or of a person adjudged to be a lunatic" is illegal and void). In 1987, Utah declared that marriage with "a person afflicted with acquired immune deficiency syndrome" is "prohibited" and "void." UTAH CODE ANN. § 30-1-2(1) (1987) (declared "void and invalid" on statutory grounds in *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993)). Such statutes provide States with the authority to deny marriage licenses to people on the basis of disabilities without any compelling interest or, indeed, any rational basis.

3. States Discriminate Against Parents With Disabilities

The right to raise one's children is protected by the Constitution. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Balanced against this right is the state's interest in the welfare of the child. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972). The fundamental nature of the rights inherent in the parent-child relationship compel the conclusion that any statute regulating this relationship must withstand strict scrutiny. *Troxel v. Granville*, 530 U.S. 57, 80 (2000).

In the parent-child relationship, States historically have treated parents with mental retardation and mental or physical disabilities quite differently from other parents. "[D]iscrimination begins with the initial decision to intervene, ends in the decision to terminate the relationship,

and is manifest in nearly every significant decision along the way."[16]

States and State courts often appear to rely on stereotypes in determining custody disputes involving parents with mental or physical disabilities, even in cases citing the "best interest of the child" standard. In *Bednarski v. Bednarski*, 366 N.W.2d 69, 73 (Mich. Ct. App. 1985), a Michigan trial court terminated a deaf woman's custody of her "[t]wo normal children," citing her deafness, forcing the appellate court to reverse. In another example, a trial judge ordered that a blind father – a successful CEO of a computer company – must be accompanied at all times by a "responsible adult" while caring for his daughter, simply because of his disability. *Clark v. Madden*, 725 N.E.2d 100, 103 (Ind. Ct. App. 2000) (reversing trial court). In *H.J.B. v. P.W.*, 628 So. 2d 753, 756 (Ala. Civ. App. 1993), an Alabama court affirmed a father's loss of custody primarily because he was HIV-positive.[17]

State agencies have also classified children with disabilities as "unadoptable" in violation of their constitutional rights. In *Baby Neal v. Casey*, 821 F. Supp.

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16 Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 Harv. L. Rev. 1202, 1227 (1990).

17 *See also In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (reversing order of trial judge awarding custody to "immoral" and "dishonest" mother because of unsubstantiated fear that the children would be "emotionally damaged because of [the father's] handicap," multiple sclerosis); *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (condemning trial court's conclusion that father "was deemed forever unable to be a good parent simply because he is physically handicapped" because "like most stereotypes, this is both false and demeaning"); *Adoption of Richardson*, 59 Cal. Rptr. 323, 327 (Ct. App. 1967) (reversing trial court refusal to permit a deaf couple to adopt a child; "[t]here can be no doubt that the judge was biased and prejudiced" against the parents "solely because they were deaf-mutes." *Id.* at 329-30. *Moye v. Moye*, 627 P.2d 799 (Idaho 1981) (epilepsy).

320 (E.D. Pa. 1993), for instance, the court permitted due process claims to proceed on behalf of two children classified as "unadoptable" by the Philadelphia Department of Human Services, one because he was tested positive for AIDS, the other because he was "handicapped."

F. Pattern of Unconstitutional State Treatment Of People With Disabilities In Institutions

In enacting the ADA, Congress found continuing State-sponsored discrimination in the "critical" area of "institutionalization," and noted as well pervasive discrimination against people with disabilities through "segregation." *See* 42 U.S.C. § 12101(a)(3), (5). The record before Congress when it passed Title II was replete with examples of unconstitutional State-sponsored discrimination in both civil and penal institutions. Such discrimination continues today.

1. States Institutionalize People With Disabilities Without Necessity And Treat Them Deplorably While They Are In Civil Institutions

Just eight years before Congress enacted the ADA, this Court decided *Youngberg v. Romeo*, 457 U.S. 307, 315-19 (1982), confirming that people in civil institutions are constitutionally entitled to safe conditions, freedom from unnecessary bodily restraints, and the training necessary to assist them in securing those rights. Nonetheless, the States when the ADA was enacted and today have proven resistant to improving the deplorable unconstitutional conditions in some civil institutions.

A case brought by a class of children with mental retardation, emotional disturbances, and physical disabilities against the State of Louisiana is a prime example of a State's continuing unconstitutional behavior. In 1976, the plaintiffs established unnecessary physical abuse, neglect, and unnecessary restraint of its wards, and the judge ordered

remedial action. *Gary W. v. State of Louisiana*, 437 F. Supp. 1209, 1219, 1213 (E.D. La. 1976). In 1990, *twenty-five years later*, and notwithstanding the judge's efforts "to facilitate, cajole, and even coerce compliance," the State institutions still were unable to prevent outright abuse of patients, or to provide minimally adequate treatment, consistent with constitutional standards. *Gary W. v. State of Louisiana*, 1990 U.S. Dist. LEXIS 1746, at *81 (E.D. La. Feb. 15, 1990).[18]

Other egregious examples abound. A federal judge recently described Alabama's institutions as "essentially warehousing patients in an inhumane environment." *Wyatt v. Rogers,* 985 F. Supp. 1356, 1361-62 (M.D. Ala. 1997). The same institutions were the subjects of similar findings, of unconstitutional conduct as early as 1971 for "grossly substandard" instances including examples of residents being scalded to death and restrained in a straitjacket for nine years, among others. *Wyatt v. Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1305 (5th Cir. 1974). The year that Congress passed Title II, the staff at a New York facility for people with mental retardation regularly left the children in their care lying half-naked and unattended in their own urine and feces on cold floors while the staff watched

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[18] Just three years ago, the General Accounting Office documented the continuing practice of unnecessary physical restraint among State institutions. GAO, *Mental Health: Improper Restraint or Seclusion Use Places People at Risk* (Sept. 1999), available at www.gao.gov/archive/1999/he99/he99176.pdf. The Department of Justice likewise has settled, with consent orders, several recent egregious cases involving unnecessary physical restraints. *See, e.g.*, Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, DOJ, to The Honorable Thomas J. Vilsack, Governor of Iowa (July 9, 2002) (residents in Iowa institution spent an average of 18 hours a month in mechanical restraints, some for as long as 300 hours a month, and many residents were injured by the use of such restraints) (available at www.usdojgov./crt/split/documents, along with several other examples).

television. *Society for Good Will to Retarded Children v. Cuomo*, 745 F. Supp. 879, 879 (E.D.N.Y. 1990).[19]

In addition to treating people with disabilities deplorably while they are in institutions, the States have a long and unconstitutional history of institutionalizing people unnecessarily. The Constitution protects individuals from unnecessary confinement in an institution. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975) (if the basis for commitment ceases to exist, continued confinement deprives the individual of a significant liberty interest).

Historically, the States institutionalized individuals with mental retardation or deafness as a matter of course, based on false stereotypes, the "science" of eugenics, and pure xenophobia. *City of Cleburne*, 473 U.S. at 461-62 (describing a pattern of State-mandated institutionalization that "paralleled the worst excesses of Jim Crow") (Marshall, J., concurring in part and dissenting in part). Although the laws that mandated institutionalization have largely been repealed, there still is ample evidence of unnecessary and unconstitutional civil commitment. Congress was aware of

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[19] *See also, e.g., Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1306-09 (E.D. Pa. 1977) (unconstitutional, deplorable, and hazardous conditions, including widespread inappropriate use of restraints and incidents of direct abuse from staff persons; the walls of the institution were covered in feces and urine and the residents were subject to outbreaks of infectious disease), *rev'd on other grounds*, 451 U.S. 1 (1980); *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473, 476 (N.D. 1982) (constitutional violations in North Dakota institutions; drugs were administered casually, often to the wrong individual; residents were regularly left naked in front of other residents; individuals' health worsened rather than improved), *aff'd*, 713 F.2d 1384 (8th Cir. 1983); *Lelsz v. Kavanagh*, 673 F. Supp. 828, 844-48 (D.N.D. Tex. 1987) (systemic understaffing and communications failures led to inappropriate medication and deaths; behavior modification techniques were "state of the art 1950s").

such evidence when it passed the ADA,[20] and the judicial record amply confirms that it exists. For example, in *Clark v. Cohen*, 794 F.2d 79, 85-86 (3d Cir. 1986), the Third Circuit documented a ten-year effort by staff at a Pennsylvania institution to secure the release of a woman with mild retardation. At age 15, in 1956, she was labeled as "severely defective" and committed without a hearing. *Id.* at 85. Even after the statute under which she was committed was repealed, and despite her doctors' recommendations that she be released, State officials never reviewed her case. *Id.* In the end, Pennsylvania did not dispute that ***forty years*** of unnecessary institutionalization had deprived the plaintiff of any hope of living the rest of her life without supervised care. *Id.* at 83. In *Eric L. By and Through Schierberl v. Bird*, 848 F. Supp. 303 (D.N.H. 1994), the court found that the State violated procedural due process, equal protection, and the ADA when it segregated children with disabilities in institutions which isolated them and denied them services and placement opportunities comparable to those available to children without disabilities.[21]

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[20] *See Accommodating the Spectrum* at 34 (noting that "segregationist purpose" of institutions continued; institutions still "lack rational admitting criteria," among other defects).

[21] *See also Thomas S. v. Morrow*, 781 F.2d 367, 369-73 (4th Cir. 1986) (North Carolina violated constitutional rights of man with mild retardation when it moved him from State hospital to a detox center rather than providing non-residential support services as hospital recommended); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1243, 1294-96 (D.N.M. 1990) (New Mexico deprived a class of unnecessarily-committed individuals with developmental disabilities of substantive due process rights in numerous instances), *rev'd in part on other grounds*, 964 F.2d 980 (10th Cir. 1992); D. Schein, *At Home Among Strangers* (1989) (describing numerous deaf individuals committed under repealed statutes allowing for commitment solely by reason of deafness or erroneously considered to have mental disabilities; continued commitment had not been reviewed). The problem of unnecessary institutionalization is still

2. States Ignore The Medical Needs Of Prisoners With Disabilities And Otherwise Violate Their Constitutional Rights

The Eighth Amendment prohibits disproportionate punishments, *Weems v. United States*, 217 U.S. 349, 366-67 (1910), and the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). State prisons nevertheless abuse prisoners with disabilities as a matter of course, denying them these fundamental constitutional protections. For example, a Michigan prison routinely forced two paraplegic inmates to sit in their own feces for hours at a time, causing them medical complications. *Parrish v. Johnson*, 800 F.2d 600, 602-03 (6th Cir. 1986). Staff habitually refused to relay the prisoners' requests for aid to nurses, and deliberately placed their food trays in inaccessible positions. Moreover, prison officials did nothing to stop a guard who on several occasions assaulted the inmates with a knife and frequently called one inmate a "crippled bastard who should be dead." *Id.* at 603. The State's conduct furthered "[n]o legitimate penological or institutional objective." *Id.* at 605.

State prisons also regularly and unconstitutionally engage in deliberate indifference to the medical needs of prisoners with disabilities, in contravention of this Court's holding in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).[22] This practice subjects prisoners with disabilities to a double punishment: In addition to their sentence, they suffer unnecessary pain and loss of dignity.

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unfortunately pervasive. *See* Sharon P. Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997), available at www.thearc.org/misc/WaitPAge/html.

[22] *Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 210 (1998), confirmed that prisoners with disabilities can sue State prisons under Title II for discrimination in the provision of medical 'services.

In *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13, 25 n.9, *vacated pending en banc rehearing*, 310 F.3d 785 (1st Cir. 2002), for instance, an inmate with Gehrig's Disease sued New Hampshire under the ADA and State laws. *Id.* at 14-15. During his confinement Mr. Kiman gradually lost the ability to control his voluntary muscles. *Id.* at 15. Despite his repeated requests, the State refused to provide him with a cane to walk or a chair to use in the shower; cuffed his hands behind his back rather than in front despite his pleas of pain; refused to move his cell from the third tier despite his inability to climb stairs; and refused to provide him a special toilet, requiring him to rely on the goodwill of his cellmates to engage in personal hygiene. *Id.* at 16. The First Circuit held that the complaint fairly could be read to allege a violation of both the Eighth Amendment and equal protection. *Id.* at 24 & 25 n.9.

The suffering endured by inmates with disabilities is reaching crisis proportions. Prisoners with disabilities are over-represented in the criminal justice system and are swelling the ranks of penal institutions.[23] A recent class action in California illustrated State-wide systemic and unconstitutional abuse of prisoners with mental disabilities. In *Coleman v. Wilson*, 912 F. Supp. 1282, 1305-23 (E.D. Cal. 1995), the record revealed that California failed to: screen inmates for medical needs; maintain basic medical records and medication policies; maintain adequate and competent staffing; appropriately use mechanical restraints; and prevent inappropriate disciplinary and behavior control measures on prisoners with mental disabilities, including use of isolation

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[23] *See* Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (June 2002) available at www.consensusproject.org. Once incarcerated, inmates with disabilities are far more likely to be victimized, exploited, and injured than other inmates. *See, e.g., Ruiz v. Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980), *aff'd*, 679 F.2d 1115 (5th Cir. 1982).

and taser guns. *Id.* Each one of these practices violated the prisoners' constitutional rights. *Id.* at 1305-25.[24]

G. Patterns Of Irrational State Segregation Of People With Disabilities From the Community

Even outside the walls of State-run institutions, the States have historically segregated Americans with disabilities from the community at large through discriminatory zoning laws. Such laws lack a rational basis when they treat people with disabilities differently than other groups without justification. *City of Cleburne*, 473 U.S. at 450 (ordinance requiring a group home for people with mental retardation to obtain a special use permit but not requiring other groups to obtain similar permits violated equal protection).

Over the past decades, many individuals with disabilities have moved from institutional settings into more integrated community settings. Unfortunately, States and municipalities reacting to pressure based on stigma and prejudice responded by enacting dispersion laws that prevent the concentration of community residences for individuals with disabilities in one area. *Epicenter, Inc. v. City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996) (cities "reacted to the deinstitutionalization movement" like "postbellum Southern state governments that passed Jim Crow laws").

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[24] *See also, e.g., Ruiz*, 503 F. Supp. at 1274-1391 (126 page opinion describing Texas' unconstitutional treatment of prisoners with disabilities, including among many other examples routinely denying prescribed treatments for prisoners who use asthmatic inhalers and wheelchairs and disciplining prisoners with mental retardation for infractions of rules they did not understand); *Yarbaugh v. Roach*, 736 F. Supp. 318, 320 (D.D.C. 1990) (prisoner with multiple sclerosis was incarcerated for over a year before he was seen by a physician and did not receive assistance in daily activities; as a consequence, he had not showered in over a year and had fallen repeatedly attempting to move from his wheelchair to his bed).

When Congress enacted Title II, this form of discrimination was extensive, and involved State as well as local/municipality action. In *Larkin v. Michigan*, 883 F. Supp. 172 (E.D. Mich. 1994), for instance, the court considered a Michigan law forbidding the licensing of a group home for people with disabilities if the group home was to be located within 1500 feet of another group home. *Id.* Finding that the dispersion requirements placed quotas on the people with disabilities who could live in a residential neighborhood, the court struck the law as without rational basis and thus violative of equal protection guarantees. *Id.* at 179-80.[25] *See also Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 n.20 (10th Cir. 1995) (statutory claim involving Utah law mandating that community housing for people with "handicap[s]" provide 24-hour supervision; "if this case had been brought as an equal protection claim, there is no evidence that the zoning restrictions were rationally related to legitimate government concerns and not based on unsubstantiated fears or irrational prejudices").

CONCLUSION

Congress' specific findings, the materials cited in this brief, and the legislative history detailed in other briefs all provide extensive and compelling evidence that States perpetuated a pattern of unconstitutional discrimination.

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[25] The Sixth Circuit affirmed on statutory grounds without reaching the constitutional issue. 89 F.3d 285 (6th Cir. 1996). Other States have similar dispersion requirements. *See, e.g.*, CONN. GEN. STAT. § 8-3f (2001); DEL. CODE ANN. tit. 22, § 309 (2002); VT. STAT. ANN. tit. 24, § 4409(f) (2002).

Respectfully submitted,

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APPENDIX

THE *AMICI* ORGANIZATIONS

The American Association of People with Disabilities ("AAPD") is a national membership organization promoting the political and economic empowerment of children and adults with disabilities in the U.S. Founded on the fifth anniversary of the ADA, AAPD has a strong interest in full enforcement and implementation of the ADA, including its application to States as covered entities.

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professional and other persons who work exclusively in the field of mental retardation. AAMR promotes progressive policies, sound research, effective practices, and human rights for people with intellectual disabilities.

AARP is a nonprofit membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Countless AARP members with disabilities rely on Title II of the ADA to assure access to public programs and services, including those provided by States and State entities, in a manner free from discrimination. These protections are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The American Council of the Blind ("ACB") is a leading national consumer organization of the blind, which strives to improve the quality of life, equality of opportunity, and independence of all persons who are blind. To that end, ACB seeks to educate policymakers about the needs and capabilities of people who are blind, to assist individuals ad organizations wishing to advocate for the needs of people who are blind, and to disseminate information to both the

blind and sighted public. ACB was at the forefront of activity that led to the enactment of the ADA. Efforts to preserve the rights gained through that statute, and to strengthen its protections for blind people, continue through our legislative and advocacy activities aimed at increasing the accessibility of employment, information, public transportation, and programs of State and local governments. As a result, ACB is deeply concerned that these rights may be in jeopardy. Further, we are concerned that, if the ADA is weakened, there will be a return to previous patterns of consistent and pervasive discrimination against persons with disabilities, and particularly persons who are blind, by State and local government entities. Therefore, we believe that efforts to preserve and vigorously enforce the ADA are of paramount importance.

The American Diabetes Association is the nation's leading nonprofit health organization providing diabetes research, information, and advocacy. Founded in 1940, the Association conducts programs in all 50 states and the District of Columbia, reaching more than 800 communities. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. To fulfill this mission, the Association funds research, publishes scientific findings, provides information and other services to people with diabetes, their families, health care professionals and the public, and advocates for scientific research and for the rights of people with diabetes.

The American Network of Community Options and Resources ("ANCOR") is a nonprofit association representing over 725 private providers offering community living, vocational, and employment supports nationwide to more than 360,000 individuals of all ages with mental retardation and other disabilities. For more than thirty-five years, ANCOR has advocated for the rights of individuals

with disabilities to receive the supports they need to live and work in the community. ANCOR is committed to ensuring effective state implementation of the Americans with Disabilities Act.

The American Occupational Therapy Association ("AOTA") is the national professional association of over 40,000 occupational therapists and occupational therapy assistants as well as students of the profession which promotes full participation in society and maximum achievement of human potential. AOTA advocates on behalf of the profession and the public, promoting health, well-being, productivity, and quality of life, through support of positive public policy such as that contained in the Americans with Disabilities Act. In addition, AOTA advocates for the full participation in society of all individuals, including the freedom of qualified individuals to practice health and other professions.

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has supported the enactment by Congress and the vigorous enforcement by the Executive Branch of our country's principal federal civil rights laws, and has consistently made its voice heard in the courts as an advocate fighting to guarantee equal treatment of all persons. ADL has filed *amicus* briefs in this Court in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, or defending government enactments designed to prevent or punish discrimination and hate. These include many of the Court's landmark cases in the area of civil rights and equal protection. In particular, ADL has supported Congress' broad authority under the Fourteenth Amendment enforcement power to remedy

constitutional deprivations caused by States, and Congress' authority to abrogate State sovereign immunity in cases of clear civil rights violations.

The Arc of the United States ("The Arc"), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and related disabilities and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, which have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act.

The Association on Higher Education And Disability ("AHEAD") is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including professional licensing and employment. Its membership includes approximately 2,000 institutions (including colleges, universities, not-for-profit service providers, and standardized testing organizations, professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education and in high-stakes standardized testing. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by post-secondary educational institutions.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

The Brain Injury Association of America is the only national nonprofit organization working on behalf of the more than 1.5 million Americans who sustain a brain injury each year and the estimated 5.3 million Americans who live with permanent disabilities resulting from a brain injury and their families. With its network of more than 42 Chartered State Affiliates and hundreds of local chapters and support groups across the country, the Association's mission is to create a better future through brain injury prevention, research, education, and advocacy.

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national non-profit public interest organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact

litigation, education, and public policy work. Founded in 1973, Lambda Legal is the oldest and largest legal organization addressing these concerns. Since 1983, when it filed the nation's first AIDS discrimination case, Lambda Legal has appeared as counsel or *amicus curiae* in scores of cases in State and federal courts on behalf of people living with HIV or with other disabilities.

The National Alliance for the Mentally Ill (NAMI) is the nation's largest grassroots organization dedicated to improving the lives of people with severe mental illnesses. NAMI has more than 220,000 members and 1,200 state and local affiliates in all 50 states, the District of Columbia, Puerto Rico and Canada. Since its creation in 1979, NAMI's members have worked extensively on a national basis to combat pervasive stigma and discrimination against persons with severe mental illnesses that impose barriers to recovery and prevent these individuals from enjoying fundamental rights accorded all other American citizens.

The National Association for Rights Protection and Advocacy ("NARPA") includes recipients of mental health and developmental disabilities services; lay, professional, and self-advocates; family members; service providers; disability rights attorneys; and teachers at schools of law, social work, and public policy. It is dedicated to promoting the preferred options of people who have been labeled mentally disabled.

For over thirty years, the National Health Law Program ("NheLP") has engaged in legal and policy analysis on behalf of low income and working poor people, people with disabilities, the elderly, and children. NheLP has provided legal representation and conducted research and policy analysis on issues affecting the health status and health access of these groups. As such, NheLP has worked with the ADA, and the program's work and our clients will be significantly affected by the Court's decision in this case.

Established in 1909, the National Mental Health Association, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity, and the opportunity to achieve their full potential free from stigma and prejudice.

National Senior Citizens Law Center ("NSCLC") is a non-profit public interest law firm which has acted as advocate for senior citizens and persons with disabilities for over 30 years. Because senior citizens have the highest incidence of disability in the general population, enforcement of laws protecting persons with disabilities is of particular concern to NSCLC and to the persons it represents.

The National Spinal Cord Injury Association is the nation's oldest and largest civilian organization dedicated to helping the hundreds of thousands of Americans coping with the results of spinal cord injury and disease. Our mission is to enable people with spinal cord injuries and diseases to achieve their highest level of independence, health, and personal fulfillment by providing resources, services, and peer support. The Americans with Disabilities Act is a critical tool in helping individuals achieve those goals.

The Polio Society serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The ADA is a key element of the Polio Society's advocacy. The members are persons with disabilities as a result of polio and post-polio syndrome.

Self Help for Hard of Hearing People ("SHHH") is the nation's leading consumer organization representing people who are hard of hearing. SHHH's mission is to open the

world of communication for people with hearing loss through information, education, advocacy, and support. It is critical to retain protection from discrimination for the 28 million people with hearing loss in the U.S.

TASH is an international advocacy association of people with disabilities, their family members, other advocates, and people who work in the disability field, all working toward a society in which inclusion of *all* people in all aspects of society is the norm. TASH was established in 1975 and has 39 chapters throughout the USA and members from thirty-eight countries worldwide. TASH's mission is to eliminate physical and social obstacles that prevent equity, diversity, and quality of life. This mission is accomplished through individual, public policy, and legislative advocacy. TASH is committed to assuring social justice and equal access for all people with disabilities and to closing institutions and other segregated settings while concentrating efforts on ensuring that people have meaningful opportunities and homes of their own.

The Women and AIDS Clinic of Rutgers University School of Law, located in Newark, New Jersey, provides legal representation to individuals with, or affected by, HIV. Through both direct legal services and impact litigation, the clinic serves low income persons on a wide variety of issues, from housing to public benefits to denial of medical services and deprivation of the custody of their children. The Clinic is familiar with serious, persistent discriminatory treatment and policies imposed on persons with HIV, particularly those of limited resources, by government entities and officials.

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES IMPOSING RESTRICTIONS ON JURY SERVICE*

ARK. CODE ANN. § 16-31-102 (1987):

Disqualifications.

(a) The following are disqualified to act as grand or petit jurors:

• • •

(2) *Mentally retarded* or *insane* persons;

• • •

(6) *Persons whose senses of hearing or seeing are substantially impaired*;

• • •

1994 Ark. Acts No. 4, § 6:

It is hereby found and determined by the General Assembly that Arkansas Code 16-31-102 disqualifies from acting as a juror any person who is mentally retarded or insane, and any person whose sense of hearing or seeing is substantially impaired; this act eliminates those disqualifications and in their place disqualifies from jury service persons who by reason of a physical or mental disability are unable to render jury services with the exception that no person may be disqualified solely on the basis of loss of hearing or sight; this modification to Arkansas Code 16-31-102 will bring Arkansas law into

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* Emphasis added throughout.

compliance with federal law; and this act should go into effect immediately in order to allow those persons to begin serving as grand or petit jurors as soon as possible. . . . .

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES EXCLUDING STUDENTS WITH DISABILITIES FROM PUBLIC EDUCATION

DEL. CONST. art. X, § 1 (1999):

Establishment and maintenance of free public schools; attendance.

Section 1. The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, *not physically or mentally disabled*, shall attend the public school, unless educated by other means.

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES RESTRICTING RIGHT TO MARRY AND FORM FAMILIES

IND. CODE § 22-1601 (1950):

Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of *insane, feeble-minded or epileptic* persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be *sexually sterilized*, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such

institution *afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness*: Provided, That such superintendent shall have first complied with the requirements of this act.

. . .

CAL. CIV. CODE § 4201 (1987):

License; necessity; contents; denial; under age applicants; forms; affidavit.

All persons about to be joined in marriage must first obtain a license therefor, from a county clerk, which license must show all of the following:

. . .

No license shall be granted when either of the parties, applicants therefore, is an *imbecile*, is *insane*, or is, at the time of making the application for the license, under the influence of any intoxicating liquor, or narcotic drug.

D.C. CODE ANN. § 30-103 (1981):

Marriages void from date of decree; age of consent.

The following marriages in said District shall be illegal, and shall be void from the time when their nullity shall be declared by decree, namely: (1) The marriage of an *idiot* or of a person *adjudged to be a lunatic*; . . .

. . .

IOWA CODE ANN. § 595.3 (West 1988):

License.

Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court. Such license must not be granted in any case:

. . .

5. Where either party is *mentally* ill or *retarded*, a *mental retardate*, or under *guardianship as an incompetent*.

MICH. COMP. LAWS § 551.6 (1990):

Mental or venereal disease; incapacity; validation of white-African marriages; penalty; competency of witness.

. . .

Section 6. No *insane person, idiot, or person who has been afflicted with syphilis or gonorrhea and has not been cured of the same, shall be capable of contracting marriage*. . . . No person who has been *confined in any public institution or asylum as a feeble-minded, imbecile or insane patient*, or *who has been adjudged insane, feeble-minded or an imbecile by a court of competent jurisdiction, shall be capable of contracting marriage* without, before the issuance by the county clerk of the license to marry, filing in the office of the county clerk a verified certificate from 2 regularly licensed physicians of this state that such person has been completely cured of such insanity, imbecility or feeble-mindedness and that there is no probability that such person will transmit any of such defects or disabilities to the issue of such marriage. *Any person of sound mind who shall intermarry with such insane person or idiot or person who has been so confined as feeble-minded, imbecile or insane patient, or who has been*

so adjudged insane, feeble-minded or an imbecile, except upon the filing of certificate as herein provided, with knowledge of the disability of such person, or who shall advise, aid, abet, cause, procure or assist in procuring any such marriage contrary to the provisions of this section, *is guilty of a felony* and on conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than $1,000.00 or by imprisonment in the state prison not less than 1 year nor more than 5 years, or by both such fine and imprisonment.

MICH. COMP. LAWS § 552.1 (1990):

Invalidity of marriages; relationship of parties, bigamy, insanity, idiocy; legitimacy of issue.

Section 1. All marriages, which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a wife or husband then living, and all marriages solemnized when either of the parties was *insane* or an *idiot*, shall, if solemnized within this state, be absolutely void. The issue of such marriage shall be deemed legitimate.

. . .

MISS. CODE ANN. § 41-21-45 (1990):

Unlawful to cohabit with feeble-minded.

It *shall be unlawful for any person to cohabit with or attempt sexual intercourse with a female who is feebleminded*, as defined in section 41-19-101, after adjudication of such feeblemindedness.

Anyone convicted of either of these crimes, shall, upon conviction thereof, be punished by a fine of not less than one thousand dollars, or imprisonment of not less than

one year in the penitentiary, or by both such fine and imprisonment.

PA. STAT. ANN. tit. 48, § 1-5 (WEST 1965):

Restrictions on the issue of marriage license.

No license to marry shall be issued by any clerk of the orphans' court.

. . .

(e) If either of the applicants is or has been, within five years preceding the time of the application, *an inmate of an institution for weak-minded, insane,* or *persons of unsound mind*, unless a judge of the orphans' court shall decide that it is for the best interest of such applicant and the general public to issue the license, and shall authorize the clerk of the orphans' court to issue the license.

R.I. GEN. LAWS § 15-1-5 (1988):

Bigamous marriages void – marriage of lunatics and idiots.

Any marriage when either of the parties thereto, at the time of the marriage, has a former wife or husband living who has not been, by final decree, divorced from such party, and any marriage where either of the parties thereto is an *idiot* or a *lunatic* at the time of the marriage, shall be absolutely void, and no life estate created by chapter 25 of title 33 shall be assigned to any widow in consequence of the marriage, and the issue of the marriage shall be deemed illegitimate and subject to all the disabilities of illegitimate issue.

VT. STAT. ANN. tit. 15, § 512 (1990):

Voidable marriages – Grounds for annulment generally.

The marriage contract may be annulled when, at the time of marriage, either party had not attained the age of sixteen years or was an *idiot* or *lunatic* or *physically incapable of entering into the marriage state* or when the consent of either party was obtained by force or fraud.

VT. STAT. ANN. tit. 15, § 514 (1990):

Party an idiot or lunatic.

(a) When a marriage is sought to be annulled on the ground of the *idiocy* of one of the parties, it may be declared void on the complaint of a relative of such idiot at any time during the life of either of the parties.

(b) When a marriage is sought to be annulled on the ground of the *lunacy* of one of the parties, on the complaint of a relative of the lunatic, such marriage may be declared void during the continuance of such lunacy, or after the death of the lunatic in that condition and during the lifetime of the other party to the marriage.

(c) The marriage of a lunatic may be declared void upon the complaint of a lunatic after restoration to reason, but a decree of nullity shall not be pronounced if the parties freely cohabited as husband and wife after the lunatic was restored to sound mind.

(d) If an action is not prosecuted by a relative, the marriage of an idiot or a lunatic may be annulled during the lifetime of both the parties to the marriage, on the complaint of a person admitted by the court to prosecute as the next friend of such idiot or lunatic.

(e) The word "lunatic" as used in sections 511-514 of this title shall extend to persons of unsound mind other than idiots.

W. VA. CODE § 48-2-2 (1990):

For what and when marriages void; affirmation of annulment of marriage.

(a) The following marriages are voidable and shall be void from the time they are so declared by a judgment order of nullity:

. . .

(3) Marriages solemnized when either of the parties:

(A) Was an *insane person, idiot or imbecile*; ...

No. 02-479

Supreme Court, U.S.
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In The
Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

v.

MICHAEL J. HASON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF MINNESOTA, CONNECTICUT, ILLINOIS, KENTUCKY, MASSACHUSETTS, MISSOURI, NEW MEXICO, VERMONT, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 100th Cong. (1988) 8

S. Rep. No. 101-116 (1989) 10, 14

Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act, 100th Cong., 2d Sess. (Comm. Print 1990) 6

U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) 5, 8, 14

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INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of eleven (11) states: Minnesota, Connecticut, Illinois, Kentucky, Massachusetts, Missouri, New Mexico, Vermont, Washington, West Virginia, and Wisconsin. The *amici curiae* States strongly support affirmance of the Ninth Circuit Court of Appeals' decision in this case and the resulting use of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131-12165, by their citizens without limitation. Although the States more typically advocate the application of Eleventh Amendment immunity, this case is different. Because of the vital public policy underlying the landmark ADA legislation, and in particular Title II, and because of the central role of the States in providing the public services, programs and activities subject to Title II, the *amici curiae* States, consistent with the obligation of their respective attorneys general to protect the public interest, file this *amici curiae* brief.

Where, as here, a legislative enactment constitutes a valid exercise of Congress's Section 5 power under the Fourteenth Amendment, the States have a compelling interest in the full implementation of the law. The States should support every effort to eradicate the effects of the documented long-term, pervasive and invidious discrimination against people with disabilities in the provision of public services. Citizens should not be dependent upon a waiver of immunity from the state to pursue the important rights protected by Title II. Rather, Title II's equal protection and due process-based purposes, and the *amici curiae* States' desire to eliminate discrimination against the members of our society with disabilities, mandate that

citizens be empowered to enforce their Title II rights without restriction.

SUMMARY OF ARGUMENT

This Court has recognized that people with disabilities suffer discrimination resulting from irrational fears, prejudices and ignorance. *See, e.g., Alexander v. Choate,* 469 U.S. 287 (1985); *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432 (1985); *School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987). In considering Title II, Congress had before it substantial and uncontroverted evidence of state-sponsored invidious discrimination against individuals with disabilities in the provision of public services, programs and activities. Indeed, states engaged in numerous activities that unconstitutionally discriminated against individuals with disabilities. While the *Garrett* Court's analysis was limited to conduct potentially violating the Equal Protection Clause, Title II also implicates other constitutional rights, including voting and access to the courts. As it relates to Title II, the legislative record identified violations in these and other constitutional categories.

In Title II, Congress provided for a congruent and proportional remedy for widespread constitutional violations by the states. In accordance with *City of Cleburne*, 473 U.S. at 442-43, where this Court recognized that the legislative branch is in a better position than the judiciary to address disability discrimination, Congress, in enacting

Title II, tailored appropriate and balanced legislation to remedy and deter continued discrimination against people with disabilities with respect to government-provided services.

The important limitations on Title II's remedial scheme provide further evidence of Congress's congruent and proportionate response to the endemic problem of disability discrimination by the states. By imposing significant restrictions on Title II's applicability, Congress appropriately balanced the needs of the states with meaningful protection against disability discrimination in public services, programs and activities. Accordingly, Title II is a valid exercise of Congress's Section 5 power.

ARGUMENT

I. This Court's Decision In *Board Of Trustees Of The University Of Alabama v. Garrett* Is Not Determinative Of The Issue Presently Before The Court.

This Court determined in *Garrett* that Congress failed to successfully abrogate state sovereign immunity in Title I of the ADA because the record did not adequately reflect a pattern of disability discrimination in state employment sufficient to justify application of the Title to the states, and because Congress failed to create a statutory remedy that was congruent and proportional to the targeted violation. *Board of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 368, 374 (2001). The Court did not extend this holding, however, to Title II of the ADA, governing the provision of public services, programs and activities. In footnote 1 of the *Garrett* opinion, this Court, recognizing

Title II's distinct remedial scheme, expressly declined to decide whether Title II could survive constitutional challenge. *Id.* at 360. Moreover, while this Court found the legislative record lacking with respect to evidence of disability discrimination in state *employment*, it explicitly noted that the "overwhelming majority" of accounts of disability discrimination in the legislative record "pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Id.* at 371 n.7. Unlike Title I, Title II passes muster under the *Garrett* analysis.

II. Congress Properly Abrogated The States' Sovereign Immunity When It Enacted Title II Of The ADA.

Congress may abrogate the states' Eleventh Amendment immunity from suit in federal court if two requirements are met. First, Congress must make its intention to abrogate "unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73 (2000) (citations omitted). Second, Congress must act in accordance with its enforcement power under Section 5 of the Fourteenth Amendment. *Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 80; *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 59 (1996).

In adopting Title II, Congress clearly stated its intention to abrogate the states' Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

Thus, the remaining issue before the Court is whether Title II of the ADA constitutes a valid exercise of Congress's Section 5 power. To be valid under Section 5, Congressional enactments "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). In contrast to *Garrett*, the legislative record supporting Title II sufficiently documents constitutional injuries by the states. Congress made explicit findings to that end. Moreover, states voiced no opposition to abrogation.

A. Congress Identified Substantial Evidence Of Irrational State Conduct Supporting Its Finding Of A History And Pattern Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities.

The legislative record supporting Title II sufficiently documents state actions that were based on irrational stereotypes against people with disabilities and, therefore, even under rational basis scrutiny, such actions violated the Equal Protection Clause. *See City of Cleburne*, 473 U.S. at 450. For example, the record before Congress included the United States Commission on Civil Rights' report, *Accommodating the Spectrum of Individual Abilities* (1983), which details the history of state institutionalization and other policies that were applied in a discriminatory manner against people with disabilities. *Id.* at 32-37. These state practices often were unconstitutionally based on "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of people with disabilities.

City of Cleburne, 473 U.S. at 467 (Marshall, J., concurring and dissenting). As Justice Marshall declared: "A regime of *state-mandated* segregation . . . emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 462 (emphasis added).

The legislative record includes various examples of state conduct devoid of any rational basis: Congress heard that a blind voter with cerebral palsy was arbitrarily refused the right to register to vote in state elections, *see* 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1219-20 (Comm. Print 1990); it heard that state mental hospitals misused medications in treating their disabled, institutionalized patients, *id.* at 1203, 1262-63; it heard that such hospitals subjected their patients to abusive treatment and inhumane conditions, *id.*; it also heard that a blind woman was refused instructions on how to use her state's voting machines, Task Force on the Rights and Empowerment of Americans with Disabilities, *Alabama Submissions* 16.[1] The record also included a statement of a mother whose deaf son was charged with speeding. The judge chose to dismiss the charges because it was "cheaper" than to provide an interpreter for the court appearance. *Id.*, *Georgia Submissions* 374.

[1] This task force was appointed by the select chairman of the House Committee on Education and the final report was printed by the Government Printing Office at the behest of the Committee.

B. In Adopting Title II, Congress Identified State Discrimination That Violated The Fundamental Constitutional Rights Of People With Disabilities.

Unlike the legislative history of Title I, the record supporting Title II shows that discrimination by the states in public services impinged upon fundamental constitutional rights of people with disabilities, including such rights as parental rights, voting rights, access to the courts and prisoners' rights. Since a higher standard of scrutiny applies to these rights, Congress was justified in concluding that the record documented constitutional violations by the states.

In *Garrett*, the Court held that the record of state conduct was insufficient to justify abrogation of sovereign immunity, in part, because of the standard of review applicable to state treatment of people with disabilities, namely the rational basis test under the Equal Protection Clause.[2] The Court determined that the respondents failed to demonstrate that the identified state conduct could never have a rational basis. In contrast to Title I, Title II addresses state conduct that impinges upon fundamental constitutional rights embodied in the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. In such a case, a higher standard of scrutiny should apply. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972)

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[2] Because state employment is not a fundamental right, in evaluating evidence of unconstitutional state action supporting abrogation under Title I, the *Garrett* court was able to consider only the limitations placed on state conduct concerning people with disabilities by the Equal Protection Clause.

(holding that right to vote can be restricted only when purpose of restriction and overriding interests served thereby meet close constitutional scrutiny); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that due process requires state to provide meaningful access to courts absent showing of countervailing state interest of overriding significance); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

The record for Title II shows that people with disabilities were denied access to public facilities, including courthouses, legislative assemblies, and voting places. *See* U.S. Comm'n on Civil Rights, *supra*, at 21-22, 38-39; *see also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 662-64 (1989) (testimony of Mary Lynn Fletcher). This lack of access adversely impacted the ability of people with disabilities to effectively participate in the state governmental process, including the ability to exercise their right to vote[3] and to utilize the state judicial system.[4]

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[3] *See, e.g., Hearing on H.R. 2273, Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong. 41, 45 (1989) (testimony of Nanette Bowling, staff liaison to mayor of Kokomo, Indiana) (describing "devastating disincentives to voting" faced by people with disabilities).

[4] *See, e.g., Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on*

(Continued on following page)

For example, Congress heard that a disabled man, called to testify in court, had to get out of his wheelchair and pull himself up three flights of stairs to reach the courtroom. Task Force on the Rights and Empowerment of Americans with Disabilities, *Alabama Submissions* 15. A disabled man who was to appear as a witness in a criminal trial had to be carried by state troopers up two flights of stairs because he had no other means to access the courtroom. *Id.*, *West Virginia Submissions* 1745. A disabled woman, to reach the polls to vote in a general election, had to leave her wheelchair, walk with two canes up a flight of steps (taking 30 minutes), walk with her canes to the voting machine (taking 25 minutes), and hold on to the machine and beat on the levers with her cane to move them to cast her vote. *Id.*, *Delaware Submissions* 307. Dozens of people with disabilities from across the country offered statements describing the ways in which they were denied access to polling places or were otherwise hampered in their ability to cast their votes.

The legislative record supporting Title II, including evidence of violations of fundamental constitutional rights by the states, justifies Congress's judgment to apply Title II to the states.

Select Educ. of the House Comm. on Educ. and Labor, 100th Cong. 40-41 (1988) (statement of Emeka Nwojke) (describing barriers faced by persons with disabilities that impeded their access to courts).

C. Congress Made Explicit Findings Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities.

Unlike Title I,[5] Title II is supported by express legislative findings of disability discrimination by the states. In the text of the statute itself, as well as in the Senate and House Committee Reports,[6] Congress made explicit findings of a history and pattern of state-sponsored discrimination in the provision of public services, programs and activities.[7] The statute expressly identifies persistent discrimination against people with disabilities in such areas of traditional state involvement as education, transportation, institutionalization,[8] health services, voting and access to public services, § 12101(a)(3), (5), as well as "outright intentional exclusion, . . . segregation, and relegation to lesser *services, programs, activities*. . . ." 42 U.S.C. § 12101(a)(5) (emphasis added).[9]

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[5] *See Garrett*, 531 U.S. at 370-372.

[6] The House and Senate Committee reports both make explicit conclusions with respect to discrimination in "public services." S. Rep. No. 101-116, p. 6 (1989) and H. R. Rep. No. 101-485, pt. 2, p. 28 (1990).

[7] "The congressional findings in 42 U.S.C. § 12101 also serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned." *Olmstead v. Zimring*, 527 U.S. 581, 613 (1999) (Kennedy and Breyer, JJ., concurring).

[8] *See, e.g., Olmstead*, 527 U.S. at 608 (Kennedy and Breyer, JJ., concurring) ("[T]he States have acknowledged that the care of the mentally disabled is their special obligation.").

[9] *See Olmstead*, 527 U.S. at 614 (Kennedy and Breyer, JJ., concurring) (stating that these findings "underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional

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Congress's findings that a pattern of state discrimination existed supporting Title II are entitled to great deference by this Court. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice v. New York*, 264 U.S. 292, 294 (1924). Moreover, "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,'" a court does "not lightly second-guess such legislative judgments." *Board of Educ. v. Mergens*, 496 U.S. 226, 251 (1990).

D. Congress's Conclusion Is Buttressed By The Absence Of State Opposition To Title II.

It is also significant that the congressional testimony contains no opposition by the states to abrogation of their Eleventh Amendment immunity. In fact, the ADA was affirmatively endorsed by the National Association of Attorneys General. *See* 135 Cong. Rec. 19,799 (1989). Indeed, Illinois Attorney General Neil Hartigan provided persuasive testimony based on the six years he had served as a state Attorney General. He testified regarding the persistent and widespread discrimination against people with disabilities involving, for example, public transportation,

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settings and policies and its concern that segregating disabled persons from others can be discriminatory.").

public services, public parks, publicly owned facilities, special education and elections. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 75-78 (1989). Attorney General Hartigan urged passage of a uniform national standard to free people with disabilities from having to win their rights on a state-by-state basis.[10] *See id.* at 77. He further explained that any meaningful legislation to combat disability discrimination must include a remedial provision. *See id.* at 80-81.

Based on the foregoing, Congress had compelling and uncontroverted evidence of widespread state discrimination against people with disabilities in the provision of

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[10] The legislative record shows that although some states had enacted disability laws, the state statutes varied greatly and many provided little meaningful protection against disability discrimination. *See, e.g., Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 334-37 (1989) (statement of Arlene Mayerson) (describing limitations and ineffectiveness of existing state statutes); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 89 (1989) (statement of Hon. Chet Brooks, Texas State Senate) ("Just as with other major civil rights issues addressed by our nation in the past, basic rights for people with disabilities have to be addressed at a national level. We cannot effectively piece these protections together state by state, person by person."); *see also* H. R. Rep. 101-485, pt. 2, at 47 (1990) ("State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing. . . . 'Too many States, for whatever reason, still perpetuate confusion.'") (quoting testimony of Admiral James Watkins before the House Subcommittee on Select Education and the Senate Subcommittee on the Handicapped).

public services, programs and activities, supporting its determination to abrogate state sovereign immunity in Title II.

III. Given The Substantial Evidence Of State-Sponsored Discrimination Against People With Disabilities, Title II Is A Measured And Balanced Response To Remedy And Deter State-Perpetuated Disability Discrimination.

Title II is both congruent and proportional to the evils found by Congress. This Court has acknowledged that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 536). This deference reflects the often complex problems facing the legislative branch. Because "difficult and intractable problems often require powerful remedies," Section 5 does not preclude Congress from creating congruent and proportional remedies around a core of documented constitutional shortcomings. *Id.* at 88.

Thus, legislation that deters or remedies constitutional violations may fall within the sweep of Congress's enforcement power even if, in the process, it prohibits conduct that is not itself unconstitutional. *City of Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). Congress is not confined to enacting legislation that merely parrots this Court's constitutional jurisprudence, but rather possesses the power under Section 5 " 'both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader

swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Garrett*, 531 U.S. at 365 (quoting *Kimel*, 528 U.S. at 81).

Title II's application to education is a ready example of the wisdom of allowing a degree of latitude to Congress in fashioning appropriate remedies for unconstitutional state conduct.[11] Congressional testimony demonstrated that individuals with disabilities were systematically denied basic educational opportunities. Although Congress had previously enacted legislation to promote educational opportunities for people with disabilities,[12] the 1983 Civil Rights Commission report determined that children with disabilities still were being deprived of an appropriate education. *See* U.S. Comm'n on Civil Rights, *supra*, at 28. Many children with disabilities simply were segregated in separate public educational facilities. *See id.* at 29. Other children with disabilities were excluded altogether from public schools for a variety of reasons, including that the children used wheelchairs, had epilepsy, or had cerebral palsy.[13] *Id.* at 27. These widespread practices necessarily

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[11] Because of the states' pivotal role in the provision of educational services, it was reasonable for Congress to conclude that Title II must include the states within its ambit for its remedial educational goals to be effectuated. The pivotal role of the states in the provision of educational services is demonstrated in the Individuals with Disabilities in Education Act, 20 U.S.C. § 1440, *et seq.*

[12] *See* 20 U.S.C. §§ 1400-1491 (originally enacted as the Education of the Handicapped Act, Pub. L. 91-230, Title VI, 84 Stat. 121, 175-188 (1970) and subsequently amended).

[13] *See* S. Rep. No. 101-116, at 7 (1989) (quoting testimony of Judith Heumann, World Institute on Disability); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ.*

(Continued on following page)

had a tremendous adverse impact on the victims of the discrimination and justify remedies that extend beyond the core of unconstitutional conduct. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting the importance of education in maintaining our civic institutions and "the lasting impact of its deprivation on the life of the child").[14]

Title II represents a valid abrogation of sovereign immunity. First, Title II appropriately proscribes unconstitutional state conduct. Second, Title II's reasonable modification provision is consistent with states' constitutional responsibilities. Finally, the limitations Congress designed ensure that constitutional state conduct is not disproportionately proscribed.

A. Title II Reasonably Proscribes Unconstitutional State Conduct.

Title II is a valid exercise of Congress's Section 5 power because it directly targets unconstitutional state conduct. Members of this Court have recognized that Title II was designed to address discrimination unconstitutional under the Equal Protection Clause:

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of House Comm. on Educ. and Labor, 100th Cong. 132-33 (1988) (testimony of Barbara Waters).

[14] As this Court reasoned in *Plyler*: "The inestimable toll of that deprivation [of education] on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." 457 U.S. at 222.

> Section 12132 can be understood to deem as irrational, and so to prohibit, distinctions by which a class of disabled persons, or some within that class, are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group in the provision of services or the administration of existing programs, or indeed entirely excluded from state programs or facilities.

Olmstead, 527 U.S. at 611, 613 (Kennedy and Breyer, JJ., concurring).

Moreover, while the Title I analysis in *Garrett* was limited to rational basis scrutiny under the Equal Protection Clause,[15] Title II protects constitutional rights beyond Equal Protection, such as the right of people with disabilities to meaningful access to the states' courts,[16] the right of people with disabilities to vote on an equal basis with other state citizens,[17] and the right of prisoners with disabilities to humane conditions of confinement.[18] State discrimination against people with disabilities with respect to these fundamental rights is subject to heightened review, and thus fully reasonable state conduct nevertheless could be unconstitutional.

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[15] *See supra* pp. 7-9.

[16] *See Bounds v. Smith*, 430 U.S. 817 (1977); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

[17] *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (denying citizens the right to vote deprives them of a "fundamental political right, . . . preservative of all rights.").

[18] *See Youngberg v. Romeo*, 457 U.S. 307 (1982).

Indeed, the *Garrett* Court's determination that Title I was disproportionate was premised on the limited reach of the Equal Protection Clause. For example, the Court noted that Title I would require an employer to modify existing facilities to accommodate a disabled employee although it would be entirely reasonable, and therefore constitutional, for the employer to instead choose to avoid the costs of providing accommodation by hiring employees who are able to use existing facilities. 531 U.S. at 372. In contrast, for example, although it may be reasonable for a state to desire to avoid the cost of providing an interpreter at the trial of a hearing-impaired criminal defendant, as would be required under Title II, this choice would violate the Due Process Clause. *See, e.g., Amadon v. Immigration & Naturalization Serv.*, 226 F.3d 724 (6th Cir. 2000) (holding that incompetent interpreter at deportation hearing deprived asylum applicant of due process right to full and fair hearing). The fundamental nature of the rights at stake justifies the breadth of Title II.

Accordingly, unlike Title I, Title II serves to protect fundamental rights in addition to Equal Protection rights. Title II is therefore a proportional response to unconstitutional state conduct.

B. Title II's Reasonable Modification Provision Is Consistent With States' Responsibilities Under The Constitution.

Given the pervasiveness of past prejudices and inequitable actions directed by states toward individuals with disabilities, Congress determined in its legislative judgment that it was not enough merely to prohibit future unconstitutional discriminatory conduct. Rather, to remedy and deter state discrimination against people with

disabilities, and further implement its Section 5 power, Congress required "reasonable modifications"[19] for qualified individuals with disabilities. A national problem of the magnitude documented by Congress and recognized by this Court, *see, e.g., City of Cleburne,* 473 U.S. at 454, 464-65, demands a solution that affirmatively prevents state-sponsored disability discrimination, provides meaningful access to public services, programs and activities, and thus integrates individuals with disabilities into public life.

In contrast to the overbreadth of the reasonable accommodation standard of Title I, which was a central part of the *Garrett* Court's analysis, Title II's analogue, reasonable modification, appropriately effectuates the states' constitutional responsibilities. The protection of fundamental rights often requires a state to do more than simply refrain from discriminating against its citizens. This and other courts have found that states are constitutionally required "to shoulder affirmative obligations" to ensure meaningful access to public services, as well as abolish barriers preventing such meaningful access.[20] *See Bounds v. Smith*, 430 U.S. 817, 824-25 (1977) (holding that fundamental right of access to courts required state to

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[19] 42 U.S.C. § 12131(2) requires reasonable modifications to rules, policies or practices, the removal of architectural, transportation and communication barriers, and the provision of auxiliary aids and services. The entirety of this provision will be referenced herein as the "reasonable modification provision." Regulations impose significant limitations on these requirements. *See, e.g.,* 28 C.F.R. § 35.130(b)(7).

[20] This Court, in *Plyler v. Doe*, recognized that one of the goals of the Equal Protection Clause is "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." 457 U.S. at 221-22. The reasonable modification provision of Title II directly serves this important goal.

provide inmates with adequate law libraries or adequate assistance from persons trained in the law; while economic factors may be considered in choosing method to provide meaningful access, "the cost of protecting a constitutional right cannot justify its total denial"); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act ban on voting literacy tests although literacy tests themselves do not violate the Equal Protection Clause; destruction of this barrier enabled individuals to better "obtain 'perfect equality of civil rights and the equal protection of the laws'") (citations omitted); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 72 (2002) (finding that state could be required to provide accommodation to hearing-impaired father in child custody proceedings both under Title II and as a matter of due process); *Amadon v. I.N.S.*, 226 F.3d 724 (6th Cir. 2000) (holding that due process right to full and fair deportation hearing required government to provide competent foreign-language interpreter).

In the same fashion as the cases cited above, Title II's "reasonable modification" provision enables people with disabilities to obtain their constitutionally guaranteed rights. Therefore, this provision is consistent with states' constitutional responsibilities.

C. Congress Imposed Important Limitations In Title II Which Produce A Congruent And Proportional Remedy.

In crafting Title II, Congress carefully considered the needs of state governments and included important limitations in the law. *See City of Boerne*, 521 U.S. at 533 (stating that limiting provisions in legislation "tend to ensure Congress's means are appropriate to ends legitimate under

Section 5"). Title II requires only reasonable modifications that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.[21] In addition, Title II does not apply to all individuals with physical or mental impairments, but, rather, only to those whose impairments substantially limit their major life activities.[22] Title II's regulations also serve to shorten the statute's reach into constitutional conduct. For example, regulations provide that when existing facilities are inaccessible, states are not required to make structural changes so long as the programs are made available to people with disabilities in some other manner. 28 C.F.R. § 35.150(b)(1).

Moreover, this Court's interpretation of Title II reinforces the limitations Congress has designed. For example, in *Olmstead v. Zimring*, this Court recognized that Title II permits the states to rely on the reasonable assessments of their own professionals in determining whether the essential eligibility requirements for habilitation in a community-based program are met. 527 U.S. at 602. In addition, this Court has recognized that Title II's reasonable modification provision does not impose "boundless"

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[21] 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7).

[22] 42 U.S.C. § 12102(2). *See, e.g., Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (holding that mitigating measures must be taken into account in determining ADA's coverage); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (construing ADA's definition of "disability" and noting: "That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act.").

responsibility upon the states. *Id.* at 603. For example, in the context of deinstitutionalization, this Court has construed the provision to permit states to take into account available resources and the needs of other mentally disabled persons. *Id.* at 607.

Thus, because Title II's intrusion into constitutional state conduct is minimal and states maintain substantial discretion over their provision of public services, programs and activities, Title II provides a congruent and proportional response to disability discrimination by the states.

CONCLUSION

Faced with well-documented incidents of state discrimination against people with disabilities in public services, Congress designed a comprehensive and integrated response that recognized the states' central role in the provision of such services. Unlike Title I, Title II involves an area of regulation for which people with disabilities have no options. That is, in contrast to employment, governments are the sole suppliers of public services. Because of the states' role, a decision by this Court that Congress did not validly abrogate Eleventh Amendment immunity may substantially diminish Title II's effectiveness. In this situation, the Court should grant Congress reasonable latitude in crafting remedies that people with disabilities can use without restriction.

For the foregoing reasons, this Court should affirm the decision of the Ninth Circuit Court of Appeals and hold that Congress, in enacting Title II of the ADA, validly

abrogated the states' sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.

Dated: February 18, 2002 Respectfully submitted,

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MEDICAL BOARD OF CALIFORNIA,
Petitioner,

v.

MICHAEL J. HASON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF FORMER SENATOR DOLE, SENATORS KENNEDY AND HARKIN, AND REPRESENTATIVE HOYER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Amos v. Maryland Dept. of Public Safety & Corr. Servs., 178 F.3d 212 (4th Cir. 1999), *vacated for rehearing en banc, subsequently dismissed pursuant to settlement*, 205 F.3d 687 (4th Cir. 2000).....24

Applicants v. State Board Of Law Exam'rs,
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Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 123 S.Ct. 72 (2002).....13

Barthelemy v. Louisiana Dept. of Health & Hosps.,
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Chisolm v. McManimon,
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City of Boerne v. Flores,
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Clark v. Virginia Board of Bar Exam'rs,
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Coleman v. Zatechka,
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Doe v. Judicial Nominating Comm'n,
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Doe v. Roe,
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Douglas v. California Dep't of Youth Auth.,
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Ellen S. v. Florida Board of Bar Exam'rs,
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Feary v. Regional Transit Auth.,
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Fiesel v. Board of Education
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Galloway v. Superior Court,
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Garcia v. SUNY Health Sciences Ctr.
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Gurmankin v. Costanzo,
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Hicks v. Armstrong,
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Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000), *cert. denied sub nom. Arkansas Dep't of Education v. Jim C*, 533 U.S. 949 (2001)..... 25-26

Kimel v. Florida Board Of Regents, 528 U.S. 62 (2000).....23

King-Smith v. Aaron, 455 F.2d 378 (3d Cir. 1972) 19

Koslow v. Pennsylvania Department of Corrections, 302 F.3d 161 (3d Cir. 2002) 25

Lane v. Tennessee, No. 98-6730, 2003 U.S. App. LEXIS 303 (6th Cir. Jan. 10, 2003) 13

Layton v. Elder, 143 F.3d 469 (8th Cir. 1998) 13

Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999) 25

Lovell v. Chandler, 303 F.3d 1039 (9th Cir. 2002), *cert. denied*, 2003 WL 95557 (Jan. 13, 2003) 25

Matthews v. Jefferson, 29 F. Supp. 2d 525 (W.D. Ark. 1998) 13

Medical Society of New Jersey v. Jacobs, Case No. 93-3670, 1993 U.S.Dist. LEXIS 14294 (D. N.J. Oct. 5, 1993).....22

Morris v. Washington Metro. Area Transit Auth., 781 F.2d 218 (D.C. Cir. 1986).....3

Nihiser v. Ohio Environmental Protection Agency, 269 F.3d 626 (6th Cir. 2001) 25

Olmstead v. L.C. ex rel. Zimring,
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Pederson v. Louisiana State University,
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Pierce v. King,
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Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 72 (2002).....3, 13

Robinson v. Kansas,
295 F.3d 1183 (10th Cir. 2002).....25

Rolland v. Cellucci,
198 F. Supp.2d 25 (D. Mass. 2002).....9

Rolland v. Cellucci,
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Sandoval v. Hagan,
197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds by Alexander v. Sandoval*, 532 U.S. 275 (2001).....25

Saunders v. Horn,
959 F.Supp. 689 (E.D. Penn. 1996).....24

South Dakota v. Dole,
483 U.S. 203 (1987).....26

Stanley v. Litscher,
213 F.3d 340 (7th Cir. 2000).....25

Staples v. Virginia Department of Corrections,
904 F.Supp. 487 (E.D. Va. 1995),
cert. denied, 116 S. Ct. 772 (1996).....24

Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995),
cert denied., 116 S. Ct. 772 (1996).....24

United States v. Lopez, 514 U.S. 549 (1995).....24

Williams v. Wasserman,
164 F. Supp.2d 591 (D. Md. 2001).....24

STATE CASES

In re Applications of Underwood and Plano,
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(Me. Sup. Ct. Dec. 8, 1993).....22

Chavich v. Board of Examiners of the Board of Education of the City of New York,
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Hill v. New York State Board of Elections,
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People v. Caldwell, 603 N.Y.S.2d 713
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42 U.S.C. § 41705 14

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135 Cong.Rec. S10753 (1989) 5

Senate Comm. On Labor and Human Resources, S. Rep. No. 116, 101st Cong. 1st Sess. (1989) 5, 19

STATE STATUTES AND RULES

Cal. Civ. Proc. Code § 901 11

Cal. Gov. Code § 12926 18

Cal. Gov. Code § 12940 18

Cal. R. Ct. 989.3 11-12

Cal. R. Ct. 1001 11

Cal. Stats. 1992 ch. 913 18

PLEADINGS

Brief for Petitioners in *Board of Trustees v. Garrett* (June 22, 2000), 1999 U.S. Briefs 1240 (LEXIS) 25

Defendant's Motion to Dismiss in *McCarthy v. Gilbert*, Civil Action No. 02-CV-600 (E.D. Tex., Beaumont Division).....24

Brief of Appellees in *Meyers v. State of Texas*, Case No. 02-50452 (5th Cir.) 24

Petitioner's Brief in *Pennsylvania v. Yeskey*, 1997 U.S. Briefs 634 (LEXIS) (March 4, 1998) 24

Szarlan v. Conn. Bar Examining Committee, No. 3:94 CV-160 (D. Conn., complaint filed Feb. 1, 1994).....22

SECONDARY SOURCES

Access for Persons with Disabilities Subcommittee, California Judicial Council's Advisory Comm. on Access and Fairness in the Courts, *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* (1997) 11

American Association of People with Disabilities, *New GAO Report Shows Disabled are Denied Voting Access* (2001) 6

American Bar Association & the National Judicial College, *Court-Related Needs of the Elderly and Persons with Disabilities, Recommendations of the February 1991 Conference* (1991) 9

American Bar Association Commission on Mental and Physical Disability Law (James Carr, Chair), *Disability Law and Policy: A Collective Vision* 50 (Chicago: American Bar Association, 1999) 11

American Psychiatric Association, "Position Statement on Confidentiality of Medical Records," *Am. J. Psychiatry* vol. 141 (1984) 21

Jon Bauer, "The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and The Americans with Disabilities Act," 49 *U.C.L.A. Law Rev.* 93 (2001).....20, 21

Claudia Center, *et al.*, "Confronting Depression and Suicide in Physicians: A Consensus Statement" (American Foundation for Suicide Prevention, 2003).....21

The Center for an Accessible Society, 8 out of 10 Polling Sites have Access Barriers, Says GAO Report (2001) 5

Coalition for Accessible Political Elections (CAPE), *Report of the National Voter Independence Project* 4

Phyllis Coleman and Ronald A. Shellow, "Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution," 20 *J. Legis.* 147 (1994).....20

Sharon Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997).....8

Jeanne Dooley & Erica Wood, *Opening the Courthouse Door: The Americans with Disabilities Act's Impact on the Courts*, 76 Judicature 39 (1992).....9

Wendy Fox-Grage et al., *The States' Response to the* Olmstead *Decision: A Work in Progress* (2002).....8

Keri K. Gould, *And Equal Participation for All . . . The Americans with Disabilities Act in the Courtroom*, 8 J.L. & Health 123 (1994).....9, 10

Thomas E. Hansen, M.D., *et al.*, "Changes in Questions About Psychiatric Illness Asked on Medical Licensure Applications Between 1993 and 1996," *Psychiatric Services*, vol. 49, no. 2 (Feb. 1998).....20, 22

James C. Harrington, "Pencils Within Reach and A Walkman or Two: Making the Secret Ballot Available to Voters Who are Blind or Have Other Physical Disabilities," 4 *Tex. F. on C.L. & C.R.* 87 (1999).....6

Stanley S. Herr, "Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities," 42 *Vill. L. Rev.* 635 (1997).....20

Home and Community-Based Services and Consumer-Directed Care Commission, *Working Plan of the Home and Community-Based Services and Consumer-Directed Care Commission* 8

Thomas W. Johnson *et al.*, *Ohio Access for People with Disabilities, Final Report to Governor Taft* (2001).....8

Maryann Jones, *And Access For All: Accommodating Individuals with Disabilities in the California Courts*, 32 U.S.F. L. Rev. 75 (1997) 11

Dr. I. King Jordan, "Colleges Can Do Even More for People With Disabilities," *The Chronicle of Higher Education*, Section 2 (June 15, 2001) 16-17

Department of Justice, Press Release, "Justice Department to Meet with Summers County Officials As Part of Initiative to Ensure Civic Access for People with Disabilities" (July 24, 2002) 12-13

Department of Justice, "Settlement Agreement Between the U.S. and the Santa Clara County Superior Court".....10

Department of Justice, "Summers County, West Virginia".....12

Steven H. Miles, M.D., A Challenge to Licensing Boards: The Stigma of Mental Illness," *JAMA*, vol. 280, no. 10 (Sept. 9, 1998) 20, 22

National Council on Disability, *Inclusive Federal Election Reform* (March 15, 2001) 4

David Pfeiffer & Joan Finn, *Survey Shows State, Territorial, Local Public Officials Implementing ADA*, 19 Mental & Physical Disability L.Rep. 537-539 (1995) 10

Randy A. Sansone, M.D., *et al.*, "Physician Mental Health and Substance Abuse: What Are State Medical Licensure Applications Asking?," *Arch. Fam. Med.*, vol. 8 (Sept./Oct. 1999).....21

Kay Schriner *et al.*, *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. Emp. & Lab. L. 437 (2000) 4

Rosalyn M. Simon, "Status of Transportation Accessibility in the United States: Impact of the Americans with Disabilities Act," in *Proceedings of Seminar L Held at the Planning and Transportation Research and Computation European Transport Forum*, Brunel University, England § 1.2 (Sept. 2-6, 1996) 14, 15

Gary A. Smith, *Status Report: Litigation Concerning Medical Services for Persons with Developmental Disabilities* (2002).....9

Alexandra Stewart *et al.*, *Implementing Community Integration: A review of State* Olmstead *Plans* (2002).....8

Nancy Weaver Teichert, *State Urged to Provide Home Care for Disabled*, Sacramento Bee, June 22, 2002, at A1 8

Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 *Temp. L. Rev.* 387 (1991) 2

Letter from Timothy M. Westmoreland, Director of Center for Medicaid and State Operations at the Health Care Financing Administration & Thomas Perez, Director of the Office for Civil Rights at the Department of Health and Human Services to State Medicaid Directors (January 14, 2000) 7

John M. Williams, *Making Access to the Ballot Box a Snap for Disabled Voters* (1999).....6

INTEREST OF *AMICI CURIAE*[*]

Amici, Senators Robert Dole, Tom Harkin and Edward Kennedy, and Representative Steny Hoyer, are current and former Members of Congress who played leadership roles in the development and passage of the Americans with Disabilities Act (ADA) from 1988 to 1990. Relevant biographical information regarding each of the *amici* is provided in the Appendix. As key authors of the ADA, *amici* have an interest in the continuing vitality of the ADA as a vehicle to bring long-excluded citizens with disabilities into the mainstream of American life.

INTRODUCTION

The Americans with Disabilities Act has begun the process of transforming the American landscape and prevalent negative stereotypes about people with disabilities by promoting the integration of persons with disabilities into all aspects of public life. By directly addressing the State and local levels at which Americans commonly interact with their government, Title II of the ADA sought to redress exclusionary policies identified by Congress that were all the more invidious for their apparent self-justification: the less people with disabilities were seen, the more they could be assumed to be both unable and unwilling to fully participate in society.

The falseness of this twin burden of inability and disinterest cast upon people with disabilities has become self-evident in the years since the ADA has come into effect. The

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, or their counsel, made a monetary contribution to the preparation and submission of this brief.

law's successes in increasing the accessibility of public transportation, courtrooms, city halls, voting, higher education and professional licensing policies has begun to remedy years of state-sponsored segregation and exclusion. By allowing people with disabilities to be seen and accepted as participating members of our society, the Act has dispelled prevailing myths, fears and prejudices concerning people with disabilities. The extensive study and the careful balancing of interests engaged in by Congress to develop a proportionate remedy to combat this historic discrimination is demonstrated by the implementation of the Act since its passage. While change is often gradual and there is still much left to be done, persons with disabilities are, for the first time, beginning to enjoy their rights as citizens.

The hard-fought gains recently achieved by the passage and enforcement of the ADA, and the promise of greater equality and opportunity in the years to come, are threatened by the States' ongoing and broad-based challenges to the constitutional validity of the Act. While this case questions Congress' authority to enact the ADA under Section 5 of the Fourteenth Amendment, other state-sponsored cases challenge the Commerce Clause and the Spending Clause as authority for federal disability rights legislation. The ADA is the culmination of over twenty years of fact finding, study, and incremental legislation to address the wide-spread exclusion and segregation of Americans with disabilities.[1] If the Court does not take this opportunity to uphold Title II of the ADA under Section 5, federal disability laws that are just beginning to enable disabled persons to participate in critical facets of American life will be undermined before the goal of full integration has been achieved.

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[1] Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 *Temp. L. Rev.* 387, 387-391 (1991).

I. TITLE II OF THE ADA IS BEGINNING TO REVERSE HISTORIC EXCLUSION AND SEGREGATION BY INTEGRATING PERSONS WITH DISABILITIES INTO THE FUNDAMENTAL ACTIVITIES OF PUBLIC LIFE.

Title II is critical to people with disabilities attempting to exercise such fundamental rights of citizenship as access to the courts, service with their peers on juries, the right to vote, the ability to enter and communicate in the halls of city council, and the ability to receive state services in the community, free of institutional segregation.[2]

While the ADA has been an invaluable stimulus for state self-examination, voluntary compliance and collaboration with the disability community, individuals with disabilities must have the right to file complaints and bring lawsuits seeking injunctive relief and damages. As with all civil rights laws, those protected by the law are the front-line agents to ensure implementation. Without the right to

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[2] While the bar of the Eleventh Amendment does not apply to local government agencies, there is no bright line test to determine whether a public entity will be considered an "arm of the state" for immunity purposes. Rather, courts must undergo a fact-specific, multi-factor inquiry based in large part on state law, funding, and structure. For example, county courts may or may not be immune under the Eleventh Amendment. *Compare Chisolm v. McManimon*, 275 F.3d 315, 323 (3d Cir. 2001) (county court is not an arm of the state) with *Alkire v. Irving* 305 F.3d 456, 467 (6th Cir. 2002) (county court is arm of state) and *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 811 (6th Cir. 2002) (court assumes state immunity would apply), *cert. denied* 123 St. Ct. 72 (2002). Likewise, transit authorities have and have not been considered arms of the state for Eleventh Amendment purposes. *Compare Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218, 224-25 (D.C. Cir. 1986) (transit authority entitled to Eleventh Amendment immunity) with *Feary v. Regional Transit Auth.*, 685 F. Supp. 137, 142 (E.D. La. 1988) (transit authority not arm of state).

damages, people with disabilities will have little incentive to bear the financial and personal burdens of initiating change when they are already subject to higher rates of unemployment, poverty and social stigma.

A. Voting Accessibility

The ability to vote is something most Americans take for granted and associate with membership in a democratic society. The fact that this basic right is still inaccessible to many individuals with disabilities demonstrates the extreme degree to which the needs of disabled citizens have been ignored by state election officials.[3] During the 1998 Congressional elections, approximately 20,000 polling places were inaccessible to wheelchair users.[4] Of those voters with disabilities who could reach the polling area, fifty-two percent found that the area lacked a designated, appropriately sized voting booth for them to cast their vote.[5] Seventy-three percent of the polling places in the major urban center of Philadelphia were physically inaccessible to voters with disabilities.[6] Eighty-one percent of voters who are blind or

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[3] In addition to accessibility issues discussed, *infra*, forty-two states totally disenfranchise citizens with mental disabilities in a variety of contexts. *See* Kay Schriner, *et al.*, *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. Emp. & Lab. L. 437, 456 tbl. 2 (2000); *Doe v. Rowe*, 156 F. Supp.2d 35 (D. Me. 2001).

[4] National Council on Disability, *Inclusive Federal Election Reform* (March 15, 2001), at http://www.ncd.gov/newsroom/publications/pdf/electionreform.pdf; Coalition for Accessible Political Elections (CAPE), *Report of the National Voter Independence Project* (last visited Feb. 16, 2003), at http://www.protectionandadvocacy.com/nationv.htm.

[5] *Report of the National Voter Independence Project*, *supra*, note 4.

[6] *Inclusive Federal Election Reform*, *supra*, note 4.

visually impaired had to rely on others to mark their ballots for them.[7] Perhaps most disturbing, more than ten years after the ADA was enacted, accessibility is often not even considered a factor in choosing polling sites.[8]

As with other areas where exclusion and segregation of people with disabilities has resulted in inaccessible public services, Title II provides an important vehicle to promote access and awareness.[9] Cases brought under the ADA are challenging inaccessible polling places, and are resulting in greater awareness by state and local voting officials. For example, the disability community in Texas filed lawsuits which resulted in cooperative efforts with election officials. Counsel for plaintiffs, James Harrington, writes that "[t]o their credit, each County showed great willingness to participate in significant negotiations. Local officials were keen on making their voting systems usable by people who are blind. This spirit of negotiation produced great

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[7] *Id.*

[8] The Center for an Accessible Society, 8 out of 10 Polling Sites have Access Barriers, Says GAO Report (2001), at http://www.accessiblesociety.org/topics/voting/gaovoterept1101.htm.

[9] Voting was plainly one of the concerns addressed in the Senate Report accompanying the Act and debated on the floor. *See* Senate Comm. On Labor and Human Resources, S. Rep. No. 101-116, 101st Cong. 1st Sess. (1989) at 12 (1989) (quoting Attorney General of Illinois, who stated that "[y]ou cannot exercise one of your most basic rights as an American if the polling places are not accessible."). *See also* 135 Cong. Rec. S10753 (1989) (remarks of Sen. Gore: "As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle discrimination that has made people with disability second-class citizens.").

creativity."[10] And, eventually, awareness of the needs of voters with disabilities became a statewide concern. As reported by Harrington, "successive Secretaries of State . . . now facilitate and actively encourage access to the secret ballot for people with disabilities." [11]

These types of lawsuits have shown that solutions are possible, and have been used by other groups to bring suits under the ADA.[12] Because of the ADA, there have also been innovations in technology which foresee a future where the gross inequality in voting access will be a thing of the past. [13]

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[10] James C. Harrington, "Pencils Within Reach and A Walkman or Two: Making the Secret Ballot Available to Voters Who are Blind or Have Other Physical Disabilities," 4 *Tex. F. on C.L. & C.R.* 87, 94-95 (1999).

[11] *Id.* at 105.

[12] For example, a coalition of groups including the Eastern Paralyzed Veterans Association and the Blinded Veterans of America began class-action lawsuits against the cities of Washington, D.C. and Philadelphia, Pennsylvania, using examples like Harris County, Texas, the nation's third largest county, which has put accessible voting systems in place. American Association of People with Disabilities, *New GAO Report Shows Disabled are Denied Voting Access* (2001), at http://www.aapd.com/docs/Gao101601.html.

[13] The Federal Election Commission estimates that 20,000 of the country's 27,000 polling sites do not meet ADA requirements. New technology is being developed and tested to achieve compliance. For example, emerging technology allows a visually impaired voter to have the ballot read to him or her, and a hearing impaired voter to utilize a hearing aid compatible headset. John M. Williams, *Making Access to the Ballot Box a Snap for Disabled Voters* (1999), at http://www.businessweek.com/bwdaily/dnflash/sep1999/nf90915c.htm.

B. Community Integration

Perhaps the most basic, yet profound impact of the ADA is the gradual reversal of a shameful history of unnecessary segregation of people with disabilities in large, state-operated institutions. This Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), has spawned a national examination of the extreme harm caused by institutionalization. As this Court stated in *Olmstead*, 527 U.S. at 601, "[C]onfinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement and cultural enrichment." Accordingly, the court found that under Title II of the ADA, states are required to provide community-based services when it is professionally advisable to do so and when the disabled individual so chooses. *Id.* at 607.

In response to *Olmstead* the Health Care Financing Administration (HCFA)[14] and the Department of Health and Human Services' Office of Civil Rights issued a set of recommendations to state Medicaid directors, outlining principles for states to consider when developing their *Olmstead* plans.[15] While change has been slow, states are beginning to explore community-based options for service.

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14 HCFA was the federal agency responsible for administering Medicaid. It is now known as the Centers for Medicare and Medicaid Services.

15 Letter from Timothy M. Westmoreland, Director of Center for Medicaid and State Operations at the Health Care Financing Administration & Thomas Perez, Director of the Office for Civil Rights at the Department of Health and Human Services to State Medicaid Directors (January 14, 2000), at http://www.cms.hhs.gov/states/letters/smd1140a.asp.

As of December 2001, 40 states, along with the District of Columbia, had commissions or task forces working to improve their state's management of long-term care.[16] However, as of May 2002, only 14 states had developed *Olmstead* plans.[17] Significantly, California has failed to do so.[18] Unfortunately, the need for the federal mandate is as urgent today as it was in 1990.[19] It is critical to the essential goals of the ADA that the states continue their efforts, and doubtful that they would do so without a federal mandate.[20]

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16 Wendy Fox-Grage et al., *The States' Response to the* Olmstead *Decision: A Work in Progress* (2002), at http://www.ncsl.org/programs/health/forum/olmsreport.htm.

17 Alexandra Stewart *et al., Implementing Community Integration: A review of State* Olmstead *Plans* 4 (2002), at http://www.chcs.org/publications/consumer.html.

18 Nancy Weaver Teichert, *State Urged to Provide Home Care for Disabled*, Sacramento Bee, June 22, 2002, at A1.

19 In 1997 there were still thousands of people nationwide who had been recommended for community placement but were waiting in institutions because of the lack of community options. Sharon Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997), at http://www.thearc.org/misc/WaitPage.html.

20 For example, as the Ohio plan states, "[s]tate policy makers must continue to be responsive to the Health Care Financing Administration and the federal Office of Civil Rights to assure Ohio's compliance with the mandates of the Americans with Disabilities Act[.]" Thomas W. Johnson et al., *Ohio Access for People with Disabilities, Final Report to Governor Taft* 3 (2001), at http://www.state.oh.us/age/ohioaccessrpt.pdf. The Introduction to the Missouri plan states that its Home and Community-Based Services and Consumer-Directed Care Commission was established "[t]o address the implications of the Olmstead decision" and that "[t]he objective of the Commission was to develop a 'comprehensive, effectively, working plan' as recommended by the U.S. Supreme Court Olmstead decision." Home and Community-Based

C. Accessibility of the Justice System

Equal participation in the justice system, whether as a party, witness, juror or advocate, is integral to the American way of life. Yet disability discrimination has been present in all aspects of the court system, from jury selection procedures that eliminate people with disabilities to the lack of sign and other interpreters for parties and witnesses to the outright lack of physical access.[21] State, territorial and municipal court systems are encompassed within the non-discrimination provisions of Title II, and are therefore required to make all court proceedings, programs and activities accessible to people with disabilities by removing architectural, communication and transportation barriers.[22]

Services and Consumer-Directed Care Commission, *Working Plan of the Home and Community-Based Services and Consumer-Directed Care Commission*, at http://www.dolir.state.mo.us/gcd/olmstead/olmreport/coverpage.htm. Similarly, "*Olmstead*" lawsuits have also resulted in the increased availability of community options. *See e.g. Barthelemy v. Louisiana Dept. of Health & Hosp.*, 2001 U.S. Dist. LEXIS 17231 (E.D. La. 2001); *Rolland v. Cellucci*, 191 F.R.D. 3 (D.Mass. 2000); *Rolland v. Cellucci*, 198 F. Supp. 2d 25 (D.Mass. 2002); Gary A. Smith, *Status Report: Litigation Concerning Medical Services for Persons with Developmental Disabilities* 15-18 (2002), at http://www.qualitymall.org/download/litigation..pdf.

21 American Bar Association & the National Judicial College, *Court-Related Needs of the Elderly and Persons with Disabilities, Recommendations of the February 1991 Conference* (1991). *See also* Jeanne Dooley & Erica Wood, *Opening the Courthouse Door: The Americans with Disabilities Act's Impact on the Courts*, 76 Judicature 39 (1992); Keri K. Gould, *And Equal Participation for All . . . The Americans with Disabilities Act in the Courtroom*, 8 J.L. & Health 123 (1994).

22 42 U.S.C. §§ 12131-12134; *see also* 28 C.F.R. § 35.130.

The actual accommodations required in any given case can be as simple as moving a juror with visual impairments closer to the witness box, providing enlarged print versions of tape transcripts used at trial, and reading documents into the record.[23] People with disabilities often are refused access to the courts not because they need complicated or expensive accommodations, but because they encounter exclusionary policies and attitudes that have never been critically examined.[24] The ADA requires that critical self-examination take place.[25]

The ADA's initiation of self-examination is an important part of its effectiveness in starting necessary systemic change in state judicial systems. For example, in

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[23] *People v. Caldwell*, 603 N.Y.S.2d 713, 714 (N.Y. Crim. Ct. 1993).

[24] For example, the District of Columbia Superior Court categorically excluded blind persons from jury service. *Galloway v. Superior Court*, 816 F.Supp. 12 (D.D.C. 1993). Santa Clara County Superior Court refused to provide auxiliary aids and services for persons with hearing impairments. DOJ, "Settlement Agreement Between the U.S. and the Santa Clara County Superior Court" at http://www.usdoj.gov/crt/ada/santacl.htm (last visited Feb. 16, 2003).

[25] Courts subject to the ADA were required to perform, within one year of the law's effective date, a self-assessment of all current services, policies and practices, and their effects. 28 C.F.R. § 35.105(a) (1993). *See also Gould*, *supra* note 21 at 148-150. According to a 1994 study conducted by David Pfeiffer and Joan Finn, based on questionnaires sent to local governments around the country as well as state and territorial governments, 85 percent of state and territorial government had conducted accessibility surveys of their court houses, and 93 percent of municipal courthouses had conducted accessibility surveys. Pfeiffer and Finn posit that "it is not possible to say that these finding are due solely to the ADA, but certainly the ADA would appear to be a significant factor: David Pfeiffer & Joan Finn, *Survey Shows State, Territorial, Local Public Officials Implementing ADA*, 19 Mental & Physical Disability L.Rep. 537-539 (1995).

1995, the California Judicial Council's[26] Subcommittee on Access for People with Disabilities[27] began "implementing the Act [ADA] in California's courts by sponsoring comprehensive research projects and adopting a series of recommendations to increase court accessibility to persons with disabilities."[28] The results of one of these surveys on "the attitudes and opinions of court personnel and people with disabilities who use the California courts indicated that numerous problems persist. A majority of the respondents (52 percent) said that they had not received requested accommodations, and nearly half (42 percent) concluded that courts do not meet ADA standards."[29] These results clearly indicate that much work remains to be done, but just as important is the fact that findings were made and published, and ultimately led to the Judicial Council's adoption of Rule of Court 989.3, which is meant to "assure that qualified

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[26] The California Judicial Council is a body that "under the leadership of the Chief Justice, is responsible for improving the quality and advancing the consistent, independent, impartial, and accessible administration of justice." Cal. R. Ct. 1001(2); *see also* Cal. Civ. Proc. Code § 901 (West 1986).

[27] The Subcommittee on Access for People with Disabilities, which consists of judges, attorneys and members of the public with specific expertise or interest in this field, was created to advise the Judicial Council on implementation of the ADA in the California court system. Access for Persons with Disabilities Subcommittee, California Judicial Council's Advisory Comm. on Access and Fairness in the Courts, *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* 1 (1997).

[28] Maryann Jones, *And Access For All: Accommodating Individuals with Disabilities in the California Courts*, 32 U.S.F. L. Rev. 75, 75 (1997).

[29] American Bar Association Commission on Mental and Physical Disability Law (James Carr, Chair), *Disability Law and Policy: A Collective Vision* 50 (Chicago: American Bar Association, 1999).

individuals with disabilities have equal and full access to the judicial system."[30] The ADA's accessibility requirements were the explicit impetus for bringing California's court system that much closer to accessibility.

Self-examination is only one vehicle for increasing awareness and making necessary modifications to allow access. Recommendations need to be implemented and Title II empowers individuals with disabilities with the legal right to enforce change. For example, almost a decade after the enactment of the ADA, a county in West Virginia had done little to ameliorate numerous physical barriers in its courthouse. The result for Joseph Bragg, a Korean War veteran and wheelchair user, is typical, when there is not access. In his words:

> I had to go to court over some property I owned, and the courtroom is on the second floor. A deputy and another man had to carry me up two flights of stairs because the old courthouse has no elevator. I didn't even ask to be carried down at lunch. Afterwards, I really needed to get to the restroom. Once I was carried back down to the first floor, my son rushed me down the hall to the men's room, but I couldn't even get my wheelchair through the door. I was so mad that I filed my complaint with the Department of Justice.[31]

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30 Cal.Ct.R. 989.3(a).

31 "Summers County, West Virginia" at http://www.usdoj.gov/crt/ada/sumstor.htm (last update July 31, 2002). *See also* DOJ Press Release, "Justice Department to Meet with Summers County Officials As Part of Initiative to Ensure Civic Access for People with Disabilities" (July 24, 2002) at

The failure of courts to provide needed accommodations deprives parties with disabilities of basic due process. For example, individuals who are deaf are often denied appropriate aids that would allow them to understand and participate in judicial and administrative proceedings.[32]

Fundamental principals of equal protection are affronted when citizens are forced to crawl or be carried up court house stairs, attend all day hearings with no opportunity to go to the bathroom,[33] or participate in proceedings without being able to hear what is being said.[34] The ADA rightly serves as a national statement that Americans with disabilities deserve better.

D. Public Transportation

People with disabilities have historically been denied access to public life by the failure to make public transportation accessible. The accessibility of buildings as well as employment and education opportunities are meaningless when people with disabilities have no way to reliably and inexpensively reach their destinations. It is not

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http://www.usdoj.gov/crt/ada/sumstr.htm; *See also, Matthews v. Jefferson*, 29 F. Supp. 2d 525 (W.D.Ark. 1998) (Court scheduled three hearings in inaccessible courtroom for paraplegic who had to be carried and had no access to bathroom); *Layton v. Elder*, 143 F.3d 469 (8th Cir. 1998).

32 *See, e.g., Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 72 (2002); *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 123 S.Ct. 72 (2002).

33 *See Lane v. Tennessee*, No. 98-6730, 2003 U.S. App. LEXIS 303 (6th Cir. Tenn. Jan. 10, 2003), at *6; *Matthews v. Jefferson*, 29 F. Supp. 2d at 528.

34 *Popovich*, 276 F.3d at 815-16.

possible to overstate the differences that Title II has made for people with disabilities who need to use public transportation. The comprehensiveness of the ADA mandate – cutting across all modes of transportation (from fixed-route buses[35] to light rail transit to cross-country trains[36]) – is critical to the law's success in actually changing how public transportation is provided across the nation. Prior to the ADA's enactment, "the provision of accessible transportation in the United States was always varied and uneven. Uniform accessible transportation did not exist until it was required by the passage of the Americans with Disabilities Act of 1990."[37]

The ADA's directive to public transit authorities, that vehicles leased or purchased after specified dates be "readily accessible to and usable by individuals with disabilities,"[38]

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35 "Fixed route buses" refer to vehicles that travel pre-arranged routes according to a set schedule and pick up/drop off members of the general public at marked stops. This can be contrasted with "paratransit," which generally refers to separate transit services that are intended specifically for use by people with disabilities, and provide origin-to-destination services (usually through prior reservation).

36 *See* 42 U.S.C. § 12141 (definition of "designated public transportation"); 42 U.S.C. § 12182(b)(2) (defining discrimination with regard to particular types of transportation). The ADA does not address modes of transportation that are covered under other laws (e.g., the Air Carrier Access Act of 1986, 49 U.S.C. § 41705, prohibits discrimination in air travel).

37 Rosalyn M. Simon, "Status of Transportation Accessibility in the United States: Impact of the Americans with Disabilities Act," in *Proceedings of Seminar L Held at the Planning and Transportation Research and Computation European Transport Forum*, Brunel University, England § 1.2 (Sept. 2-6, 1996).

38 42 U.S.C. § 12142(a)-(c) (collectively encompassing new, used and remanufactured vehicles).

initiated significant measurable changes in national transportation accessibility. As Rosalyn M. Simon notes:

> In 1989, one-third (36%) of the national bus fleet was accessible. Post-ADA fixed route bus accessibility increased to 39 percent in 1990, 46 percent in 1991, and 52 percent in 1992. Using data reported in transit system 1994 ADA plans, the federal government reported the national bus fleet as 55 percent accessible with 29,000 lift/ramp-equipped buses in 1994 and 60 percent accessible with 32,000 lift-ramp-equipped buses in 1995. Their projections indicate that by 2002, the national bus fleet will be 100 percent lift/ramp-equipped. In addition, by 2005, all fixed route buses will also be equipped with ADA-compliant communication systems . . . More than 100 public transit systems are now providing 100 percent accessible fixed route bus service during peak hours.[39]

These dramatic improvements in accessibility are directly attributable to Congress' establishment of broad national standards for public transportation accessibility. Without the ADA, the interstate mobility of people with disabilities would always be subject to substantive and technical differences in state accessibility requirements. The ADA transportation provisions represent many years of negotiation with transit authorities. The provisions are reasonable and gradual, based on the turnover of vehicles, a natural consequence of normal wear and tear and technical obsolescence; if turnover is no longer subject to accessibility requirements, public transportation fleets could return to their

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39 *Supra* note 37, at § 3.1.

previous inaccessible state as quickly as they became accessible.

E. Higher Education

The 1990 Americans with Disabilities Act has spurred increased enrollment of students with disabilities in institutions of higher education. The law's mandate that colleges and universities remove campus architectural barriers and provide accommodations such as readers for students with vision impairments and sign language interpreters for deaf students have enabled tens of thousands of people with disabilities to attain a post-secondary education and enter the nation's workforce.

As reported by Dr. I. King Jordan, the first deaf president of Gallaudet University:

> Certainly, life before the A.D.A. was rampant with physical and social barriers that prevented disabled people from making even rudimentary decisions. Many were trained in sheltered workshops, or warehoused by families and educational systems embarrassed by their very existence, and convinced they had little potential for success.
>
> Being deaf, I at least had the opportunity for a fine, accessible undergraduate education at Gallaudet and the chance to go on for graduate degrees. However, when I entered the University of Tennessee's graduate program in psychology in 1969, I did so realizing that it would be a rough ride. I neither expected nor received any special accommodation. As a consequence, day after day I sat through classes understanding little if anything my

professors said. I depended on the good will of my classmates to share their notes with me, and I spent long nights in the library in order to keep up with my classes. It was both a grueling and lonely period, and most deaf students had similar experiences at the time. Had I been blind or a wheelchair user, it would have been considerably more of a challenge, as most campuses were not accessible to individuals with mobility disabilities. . . .

[I]t is now commonplace to find deaf and hard-of-hearing students – accompanied by sign-language interpreters or having access to real-time captioning – taking classes in universities throughout the country. Similarly, students in wheelchairs zipping across our campuses, or blind students reading Brailled texts and using specially equipped computers, have become familiar. They may continue to spend time in the library or compare notes with classmates, but it is not for the same reason that I did. Thanks to the A.D.A., many communications and other barriers have been removed, and disabled students are guaranteed the right to equal educational opportunity.[40]

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[40] Dr. I. King Jordan, "Colleges Can Do Even More for People With Disabilities," *The Chronicle of Higher Education*, Section 2 (June 15, 2001), at http://president.gallaudet.edu/chron.html.

The ADA has not eliminated discrimination in the hallways of higher education.[41] Aspiring students with disabilities still face physical, attitudinal and procedural barriers every day, but there can be no doubt that the ADA has brought in a new era in higher education, resulting in changed attitudes about and increased opportunities for people with disabilities.

F. Licensing

State governments regulate countless areas of employment through licensing programs.[42] Accordingly, it is unsurprising that the Department of Justice regulations on Title II expressly provide that a public entity "may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(6); *see also* § 35.130(b)(1) ("A public entity, in providing any aid, benefit, or service, may not, directly or

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[41] *See, e.g., Coleman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993) (University refused to assign roommate to student who used a wheelchair and the services of a personal attendant).

[42] In California, for example, the state licenses virtually every profession and vocation. It should be noted that contrary to Petitioner's assertion that "California's own statutory prohibition against discrimination in licensure on the basis of disability antedated the ADA by eight years," *see* Petitioner's Brief, pp. 24-26, n.9, prior to the ADA California prohibited discrimination only on the basis of "physical handicap" and "medical condition," which was defined as having a prior cancer diagnosis. Persons with mental disabilities were not covered. It was only in 1992, after the passage of the ADA and prompted by it, that state law was amended to protect persons with mental as well as physical disabilities from discrimination. *See* Cal. Stats. 1992 ch. 913 (Assembly Bill 1077). *Compare* Cal. Gov. Code §§ 12926 & 12940 (1992) (available in LEXIS's 1991 legislative archive for California) with Cal. Gov. Code §§ 12926 & 12940 (1993) (available in LEXIS's 1992 legislative archive for California).

through . . . licensing, or other arrangements, on the basis of disability – . . . [d]eny a qualified individual with a disability the opportunity to participate . . .".) The ADA structure promotes fairness and safety by focusing upon *qualifications*: an unqualified or unsafe applicant need not be licensed. *Id.*[43] Further, a public entity cannot be compelled to make any fundamental alterations in its program. 28 C.F.R. § 35.164.

Historically, certification and licensing programs have functioned to unfairly exclude some individuals with disabilities from certain activities. For example, as Congress learned during the ADA hearings, teachers have been excluded from required certification on the basis of disability.[44] Many of these outright exclusions from licensing and certification have been remedied through the application of the Rehabilitation Act of 1973 and the

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[43] In this case, on remand, Dr. Hason will be required to demonstrate such qualifications and abilities; if he cannot, his suit is subject to dismissal on the merits.

[44] One witness recounted a series of discriminatory encounters by public entities, including the denial of a teaching credential because she was paralyzed as a result of childhood polio. Senate Comm. On Labor and Human Resources, S. Rep. No. 116, 101st Cong. 1st Sess., 7. In Philadelphia, prospective teachers with "chronic or acute physical defects," including blindness, were barred from taking the required examination. *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Penn. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977); *see also King-Smith v. Aaron*, 455 F.2d 378 (3d Cir. 1972) (blind applicant to teach in Pittsburgh public school system rejected from placement on eligibility list based on vision). In New York, a woman with spina bifida was denied her teaching license on the basis that she was physically "not fit." *Fiesel v. Board of Education of the City of New York*, 490 F. Supp. 363 (E.D. N.Y. 1980). Also in New York, a blind applicant was denied certification to teach junior high vocal music, as he was "not fit" due to "defective vision.". *Chavich v. Board of Examiners of the Board of Education of the City of New York*, 252 N.Y.S.2d 718 (N.Y. Spec. Term 1964).

Americans with Disabilities Act of 1990, permitting far greater opportunity for persons with disabilities.

Even where outright exclusions have not existed, discrimination has occurred through onerous and intrusive licensing procedures. In deciding whether an applicant or licensee is fit to practice, professional licensing boards frequently make extremely broad inquiries into the individual's psychiatric history, treatment, and diagnoses.[45] As many commentators have noted, these investigations are not always tailored to the central relevant question: whether the individual is able to safely and competently practice their chosen profession.[46] Frequently, those who have responded affirmatively to these questions have been forced to disclose additional, highly intimate psychiatric information and records, have endured additional procedural steps, including oral questioning before licensing boards, and have experienced significant delay in obtaining or renewing their

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[45] Thomas E. Hansen, M.D., *et al.*, "Changes in Questions About Psychiatric Illness Asked on Medical Licensure Applications Between 1993 and 1996," *Psychiatric Services*, vol. 49, no. 2 (Feb. 1998) (in 1993 and 1996, 75 and 80 percent of medical boards, respectively, used forms which contained inquiries about mental illness); *Clark v. Virginia Bd. of Bar Exam'rs*, 880 F. Supp. 430, 433 (E.D. Va. 1995) (as of 1995, 32 state had broad mental health inquiries for bar applicants, ten states and the District of Columbia asked about hospitalizations, and seven states included no mental health inquiries).

[46] *See, e.g.*, Jon Bauer, "The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and The Americans with Disabilities Act," 49 *U.C.L.A. Law Rev.* 93 (2001); Stanley S. Herr, "Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities," 42 *Vill. L. Rev.* 635 (1997); Phyllis Coleman and Ronald A. Shellow, "Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution," 20 *J. Legis.* 147 (1994). According to the American Psychiatric Association, the psychiatric history of an applicant is not an accurate predictor of fitness. *Clark*, 880 F. Supp. at 435.

license.[47] The public health implications are considerable: many students and professionals have been deterred from appropriate and preventive mental health treatment.[48] Again, the ADA has been instrumental in remedying these practices, by focusing upon actual qualifications and abilities, rather than generalizations and stereotypes about mental conditions.[49]

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47 Steven H. Miles, M.D., A Challenge to Licensing Boards: The Stigma of Mental Illness," *JAMA*, vol. 280, no. 10 (Sept. 9, 1998) (detailing demands of medical board for ongoing release of all psychiatric records after author with no record of incompetence disclosed bipolar diagnosis); Randy A. Sansone, M.D., *et al.*, "Physician Mental Health and Substance Abuse: What Are State Medical Licensure Applications Asking?," *Arch. Fam. Med.*, vol. 8 (Sept./Oct. 1999), pp. 448-49 (noting procedural hurdles and privacy concerns triggered by affirmative responses); Jon Bauer, *supra* at 101-125 (recounting negative and protracted experiences of several Connecticut applicants); Claudia Center, *et al.*, "Confronting Depression and Suicide in Physicians: A Consensus Statement" (American Foundation for Suicide Prevention, 2003), submitted to *JAMA* for publication (reviewing discrimination in medical licensing, hospital privileges, and insurance faced by physicians with psychiatric disorders).

48 *Clark*, 880 F. Supp. at 445-46 (citing plaintiff's "considerable evidence of the stigmatizing and inhibiting effect of broad mental health question[ ]" which "both amplifies the stigmatization of disabled persons and, at the same time, deters the counseling and treatment from which such persons could benefit," in issuing injunction); Steven H. Miles, M.D., *supra* (describing physicians who have avoided treatment); Sansone, M.D., *supra* at 449 (citing "realistic concern" that inquiries may cause physicians to avoid or postpone treatment); American Psychiatric Association, "Position Statement on Confidentiality of Medical Records," *Am. J. Psychiatry* vol. 141 (1984), pp. 331-32 (expressing concern that licensing board questions focusing on diagnosis or treatment deters physicians from seeking help).

49 *Clark*, 880 F. Supp. at 437 (unnecessary mental health question on a bar application violates the ADA's prohibition against discriminatory eligibility criteria); *Ellen S. v. Florida Board of Bar Examiners*, 859 F.

II. THE CONTRIBUTIONS OF THE ADA ARE THREATENED BY SOME STATES' ONGOING AND BROAD-BASED CONSTITUTIONAL CHALLENGES TO ITS VALIDITY.

The question now before this Court is whether Congress had the authority under Section 5 of the Fourteenth Amendment to enact Title II of the Americans with Disabilities Act, which permits individuals to seek money damages from the State to remedy disability discrimination. As this Court reviewed in *Garrett*, "Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1 by enacting

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Supp. 1489, 1494 (S.D. Fla. 1994) (Florida's mental health questions "discriminate against Plaintiffs by subjecting them to additional burdens based on their disability."); *Medical Society of New Jersey v. Jacobs*, 1993 U.S. Dist. LEXIS 14294 (D. N.J. Oct. 5, 1993) (mental health questions imposed extra burdens on qualified persons with disabilities in violation of ADA); *In re Applications of Underwood and Plano*, 1993 Me. LEXIS 267, 3 Am. Disabilities Cas. (BNA) 573 (Me. Sup. Ct. Dec. 8, 1993) (requirement that applicants answer mental health questions discriminates on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities); *Szarlan v. Conn. Bar Examining Comm.*, No. 3:94 CV-160 (D. Conn., complaint filed Feb. 1, 1994) (after complaint filed and several hearings, Connecticut bar voted to eliminate its broad question about outpatient treatment, and replace it with tailored question regarding impaired ability to practice law); Steven H. Miles, M.D., *supra* (after discrimination complaints were filed, the board agreed to make the relicensing questionnaire focused upon whether the physician is impaired in his or her ability to practice, and to narrow access to medical records); Hansen, M.D., *supra* (noting increased focus of application questions on impaired professional abilities rather than psychiatric condition alone, and concluding that the enforcement of the ADA appears to be encouraging revised questionnaires); *see also Doe v. Judicial Nominating Comm'n*, 906 F. Supp. 1534 (S.D. Fla. 1995); *but see Applicants v. State Bd. Of Law Exam'rs*, 1994 U.S. Dist. LEXIS 21290, 4 Am. Disabilities Cas. (BNA) 165 (W.D. Tex. Oct. 11, 1994).

'appropriate legislation.'" *Bd. Of Trustees v. Garrett,* 531 U.S. 356, 365 (2001). This power "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. Of Regents,* 528 U.S. 62, 81 (2000); *City of Boerne v. Flores,* 521 U.S. 507, 536 (1997).

As this Court has reiterated, however, legislation which reaches beyond the scope of Section 1's actual guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Garrett,* 531 U.S. at 365 (citing *City of Boerne,* 521 U.S. at 520). Accordingly, in this case, the Respondent and his *amici* have demonstrated a long history and pattern of unconstitutional conduct in the administration of those very activities regulated by Title II – the "services, programs, [and] activities" of the State. As set forth in the briefs submitted, state conduct excluded and, too often, continues to exclude, disabled persons from public education, public transportation, voting, community services, and, quite literally, city hall. Congress took care to document the shameful legacy of state-sponsored discrimination in the voluminous legislative history of the ADA, and to craft the congruent and proportional response found in Title II of the Act.

While this case is limited to one relatively circumscribed, albeit critical, aspect of federal disability discrimination law – the availability of damages under Title II – this challenge to Congress' Section 5 authority is but one part of an ongoing challenge by some States to Title II.

States are also challenging Congress' power to enact all[50] or portions of Title II[51] under the Commerce Clause.

States attempt to minimize the effect of invalidating Title II under Section 5 by referring to parallel protections in

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[50] Challenges to injunctive relief under *Ex Parte Young* continue despite the fact that this Court has already resolved the question. *Garrett*, 531 U.S. at 32 n.9. *See, e.g.*, Defendant's Motion to Dismiss in *McCarthy v. Gilbert*, Civil Action No. 02-CV-600 (E.D. Tex., Beaumont Division) (arguing that *Ex Parte Young* cannot be used to enforce Title II of the ADA or its regulations because Title II exceeds the scope of Congress' power under Section 5 and the Commerce Clause); Brief of Appellees in *Meyers v. State of Texas*, Case No. 02-50452 (5th Cir.) (on appeal from the U. S. Dist. Ct, W.D. Tex., Austin Div.) ("Because it offends fundamental notions of federalism to permit *Young* suits based on statutes Congress lacked authority to enact under Section 5, the Court should hold that there is no Eleventh Amendment exception permitting prospective enforcement of federal laws – like Title II – under which Congress did not abrogate Eleventh Amendment and sovereign immunity."); *Williams v. Wasserman*, 164 F. Supp.2d 591, 598 n.10 (D. Md. 2001).

[51] Several states, including Connecticut, Pennsylvania, North Carolina, Maryland, and Virginia, have argued that Congress lacked Commerce Clause authority to regulate prisons under the ADA. See Petitioner's Brief in *Pennsylvania v. Yeskey*, 1997 U.S. Briefs 634 (LEXIS) (March 4, 1998) ("[n]either the Commerce Clause nor the Fourteenth Amendment gives Congress the power to regulate the management of state prisoners"); *Saunders v. Horn*, 959 F. Supp. 689 (E.D. Penn. 1997); *Pierce v. King*, 918 F. Supp. 932, 938 (E.D.N.C. 1996) (Congress lacked Commerce Clause authority, as prison labor does not substantially affect interstate commerce, citing *United States v. Lopez*, 514 U.S. 549 (1995)); *Staples v. Virginia Dept. of Corrections*, 904 F. Supp. 487, 490 (E.D. Va. 1995) (citing *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996); *Amos v. Maryland Dep't of Safety*, 178 F.2d 212 (4th Cir. 1999), *vacated for rehearing en banc, subsequently dismissed pursuant to settlement*, 205 F.3d 687 (4th Cir. 2000); *Hicks v. Armstrong*, 116 F. Supp.2d 287 (D. Conn. 1999).

504.[52] However, states continue to challenge applications of the Rehabilitation Act of 1973 as unauthorized by the Spending Clause. The states argue that they have not waived their sovereign immunity by accepting federal funds, an argument which has been correctly rejected by most federal appellate courts.[53] More significantly, the states continue to argue that the requirements of the Rehabilitation Act are not "reasonably related" to the purposes of the federal funds disbursed, and that so conditioning the funds is unconstitutionally coercive, an argument that has also been rejected.[54]

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[52] *See, e.g.* Brief for Petitioners in *Garrett* (June 22, 2000), 1999 U.S. Briefs 1240 (LEXIS) at * 38 (noting availability of "comparable injunctive and monetary remedies of the Rehabilitation Act").

[53] *See, e.g., Koslow v. Pennsylvania Dep't of Corrections*, 302 F.3d 161 (3d Cir. 2002); *Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002) (Section 504 and Title VI); *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812 (9th Cir. 2002), *rehearing en banc denied*, 285 F.3d 1226 (9th Cir. 2002); *Nihiser v. Ohio Environmental Protection Agency*, 269 F.3d 626 (6th Cir. 2001); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.*, 121 S.Ct. 2591 (2001); *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds, Alexander v. Sandoval*, 532 U.S. 275 (2001). *Cf. Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999) (both Title IX cases). *But see Garcia v. SUNY Health Sciences Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001).

[54] *See, e.g., Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002), *cert. denied*, 2003 WL 95557 (Jan. 13, 2003); *Koslow v. Pennsylvania Dep't of Corrections*, 302 F.3d 161, 175-76 (3d Cir. 2002); *Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc) (rejecting state's argument that Rehabilitation Act requirements upon federal funding were unduly coercive), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.*, 121 S.Ct. 2591 (2001). However, in *Jim C.*, the dissenting four judges used the test enunciated by this Court in *South*

CONCLUSION

Continued challenges by some States to the newly established rights of disabled Americans disregard the pervasive history of discrimination faced by people with disabilities and the studied, gradual and reasonable approach taken by Congress in fashioning an appropriate remedy. These long awaited rights are well within Congress' authority to enforce the Fourteenth Amendment as set forth by this Court in *Garrett*.

In enacting the ADA, Congress invoked "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). As demonstrated in the briefs filed by respondent and his *amici*, Congress developed a record of pervasive state-sponsored discrimination and designed a proportionate response based on principles of reasonableness and qualifications.

The promise of the ADA is just beginning to be realized. States are making the basic vestiges of citizenship available to persons with disabilities for the first time in history. This progress is in keeping with the most fundamental principles of equality embodied in the Fourteenth Amendment. There can be no doubt that the invalidation of Congress' long and deliberative process in recognizing and remedying "the continuing existence of unfair and unnecessary discrimination and prejudice"[55] toward people with disabilities will impede continuing

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Dakota v. Dole, 483 U.S. 203 (1987) as the basis for opining that Congress lacked authority under the Spending Clause to enact Section 504. 235 F.3d at 1082-85 (8th Cir. 2000) (en banc).

[55] 42 USC § 12101 (9).

progress toward a nation where people with disabilities can participate fully in civic life.

When President George H.W. Bush signed the Americans with Disability Act he stated:

> And today, America welcomes into the mainstream of life all of our fellow citizens with disabilities. We embrace you for your abilities and for your disabilities, for our similarities and indeed for our differences, for your past courage and your future dreams. Last year, we celebrated a victory of international freedom. Even the strongest person couldn't scale the Berlin Wall to gain the elusive promise of independence that lay just beyond. And so, together we rejoiced when that barrier fell.
>
> And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.

While progress has been great, the ADA is still an indispensable tool to put equal citizenship firmly within the grasp of Americans with disabilities.

Respectfully submitted,

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APPENDIX

BIOGRAPHIES OF *AMICI CURIAE*

Former Senator Robert Dole served as the Republican Senator from Kansas from 1969 to 1996. During that time, he served as the Majority and Minority Leader in the Senate and was an original co-sponsor of the ADA. Senate Dole was a leader in the negotiations that led to the passage of the ADA.

Senator Tom Harkin is the Democratic Senator from Iowa, and has served in the Senate since 1985. Senator Harkin was the chief sponsor of the ADA in the Senate, and chair of the former Disability Policy Subcommittee of the Senate Labor and Human Resources Committee. In these roles, Senator Harkin was a leader in the negotiations that resulted in the ADA's passage.

Senator Edward Kennedy is the senior Democratic Senator from Massachusetts and has served in the Senate since 1963. From 1987 to 1994, Senator Kennedy chaired the Senate Labor and Human Resources Committee. In 1989, Senator Kennedy, together with Senator Tom Harkin and 32 other Senators introduced the second version of the ADA. Senator Kennedy played a key role in the negotiations and compromises that resulted in passage of the ADA.

Congressman Steny Hoyer is the Democratic Representative from the 5th district of Maryland. Congressman Hoyer was chairman of the House Democratic Caucus from 1989 to 1994. From 1989 to 1990, Congressman Hoyer led the negotiations of the ADA on behalf of the Democratic House leadership as the bill passed through four House committees.

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IN THE

Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,
Petitioner,

v.

MICHAEL J. HASON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

May state governments be sued for violating Title II of the Americans with Disabilities Act, which prohibits discrimination against individuals with disabilities in government "services, programs, or activities"? More specifically, is Title II of the Americans with Disabilities Act a proportionate and congruent means to prevent and remedy pervasive violations of the constitutional rights of people with disabilities that deny equal access to the basic functions of state governments?

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Americans with Disabilities Act of 1989, Hearings on S.933 Before the Sen. Comm. on Labor and Human Res. And the Subcomm. on the Handicapped, 101st Cong., 1st Sess. (1989) 20

Equal Access to Voting for Elderly and Disabled Persons, Hearings Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. (1984) 19

H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990) 18, 24, 35

S.Rep. No. 116, 101st Cong., 1st Sess. (1989) 18, 19, 26, 27, 35

Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1220 (1990)...19, 20, 24, 26

135 Cong. Rec. S4986 (daily ed. May 8, 1989)..... 22

135 Cong. Rec. S10753 (daily ed. Sept. 7, 1989).. 19

136 Cong. Rec. H2477 (daily ed. May 17, 1990).. 22

136 Cong. Rec. H2480 (daily ed. May 17, 1990).. 25

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OTHER

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Emily Bazar, *State Agencies Lag Badly in Complying with a 1995 Deadline to Provide Full Access*, Sacramento Bee, June 17, 2001..... 29

California Att'y Gen., *Commission on Disability: Final Report* (Dec. 1989)..... 25

Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983)..... 19, 20, 22, 23, 24, 25, 26

Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002)..... 29, 30

Federal Election Commission, *Polling Place Accessibility in the 1988 General Election* 7 (1989)..... 19

General Accounting Office, Voters With Disabilities—Access to Polling Places and Alternate Voting Methods (2001)..... 28

National Council on the Handicapped, *On the Threshold of Independence* (1988)..... 26

Laura F. Rothstein, *Symposium: The Americans with Disabilities Act: A Ten Year Retrospective*, 52 Ala. L. Rev. 241 (2000)..... 33

IN THE

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No. 02-479

MEDICAL BOARD OF CALIFORNIA,
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MICHAEL J. HASON,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The Medical Board of California denied Dr. Michael J. Hason a medical license because of his history of depression.[1]

[1] Because the District Court granted the defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the allegations of the plaintiff's complaint must be taken as true. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). Petitioner, Medical Board of California, asserts facts in its Statement of the Case which have no support in the record of this case and are false. For example, in an effort to tarnish Dr. Hason's qualifications and capabilities as a physician, the Medical Board says that he was denied a medical license because of a "history of untreated mental illness and multiple drug dependency." Pet. Br. at 6. However, Dr. Hason's complaint alleges, and it is undisputed, that he was receiving treatment for depression at the time he was denied a medical license. Complaint, ¶¶ 29, 30, App. to Cert. Pet. at 47; J.A. at 20. As the Court of Appeals observed: "Dr. Hason's complaint also alleges, however, that by the time of the Medical Board's decision he had received treatment for his

A graduate of Yale College and New York Medical College, Dr. Hason received a medical license in New York and worked successfully as a physician at St. Vincent's Hospital, Bridgeport, Connecticut, 1991-1992, the State University of New York at Stony Brook, 1993-1994, and VA Medical Center in Los Angeles, California, 1994-1995. App. to Cert. Pet. at 46.

In 1995, Dr. Hason applied for a medical license in California. In 1998, the California Medical Board denied Dr. Hason's application for a medical license based on his history of depression. The Administrative Law Judge stated that Dr. Hason should continue his therapy and reapply for a license. J.A., at 20.

Dr. Hason filed a *pro se* complaint in federal district court on April 21, 1999, seeking injunctive relief and monetary damages for violations of his rights under the United States Constitution and the Americans with Disabilities Act ("ADA"), as well as state tort claims. App. to Cert. Pet. at 37. The District Court accepted a Report and Recommendation from a United States Magistrate Judge and granted the defendants' motion to dismiss, concluding that neither state officers nor the state government could be sued for injunctive or damage relief because of the Eleventh Amendment. App. to Cert. Pet. at 15, 17, 19-23. The District Court also held that there was no cause of action under Title II of the ADA for discrimination by state governments based on disability in issuing a medical license. *Id.*

The United States Court of Appeals for the Ninth Circuit reversed the District Court, holding that (1) state officers may be sued for injunctive relief; (2) Title II of the ADA

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disability and was capable of practicing medicine." App. to Cert. Pet. at 11. Moreover, there is nothing in the record of this case supporting the claim that Dr. Hason suffered from "multiple drug dependency." No such statements appear in the Administrative Law Judge's ruling denying Dr. Hason a medical license, J.A., at 20, and further the assertions are untrue.

represents a permissible exercise of Congress's power pursuant to section five of the Fourteenth Amendment and could be used to sue the state government; and (3) discrimination against individuals with disabilities in medical licensing constitutes "services, programs, or activities" of the state within the meaning of Title II. App. to Cert. Pet. at 1. The Court of Appeals denied the Medical Board's petition for *en banc* review. App. to Cert. Pet. at 26.[2]

SUMMARY OF ARGUMENT

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, is different from other statutes that this Court has analyzed as to whether state governments may be sued for violation of federal laws. Title II, unlike the Age Discrimination in Employment Act, 29 U.S.C. § 623, or Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111, or the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D), is directed exclusively at state and local governments acting in their sovereign capacities. While these other statutes involve employment decisions, the unambiguous purpose of Title II is to protect the rights of millions of Americans with disabilities to participate on a non-discriminatory basis in the central functions of state and local governments. Title II exists to ensure that individuals with disabilities have access to their government in the same way as other citizens. As this Court powerfully observed: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

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[2] The Medical Board sought certiorari as to the second two issues, whether state governments may be sued for violating Title II and whether discrimination in licensing is within the scope of Title II. This Court, however, granted certiorari limited to the first question.

The Age Discrimination in Employment Act and Title I of the ADA involve discrimination that receives only rational basis review under this Court's equal protection jurisprudence. In sharp contrast, Title II of the ADA involves protecting fundamental rights—in areas such as voting, access to the courts, freedom from unjustified confinement, and travel—where courts traditionally have applied strict scrutiny.

Moreover, unlike the employment context, an extensive legislative record documented a long and sorry history of pervasive state discrimination against individuals with disabilities in the areas covered by Title II. Title II is therefore most analogous to the Voting Rights Act, 42 U.S.C. § 1971, *et. seq.*, which this Court in *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 373-374 (2001), identified as the model of a permissible enactment under section five of the Fourteenth Amendment. Title II and the Voting Rights Act share in common proscriptions against the denial of fundamental rights by governmental bodies upon findings of pervasive discrimination. They are about nothing less than protecting the capacity of a historically disadvantaged group to participate in and have access to their government.

This Court has held that "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. at 363 (citation omitted). Title II satisfies these criteria. There is no dispute that the ADA, 42 U.S.C. § 12202, expressly authorizes suits against state governments. *Id.* at 363-364 (noting that the ADA unequivocally authorizes suits against state governments).

In evaluating whether Title II is within the scope of Congress's section five authority, this Court has prescribed three questions: First, what are the constitutional rights at issue?

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. at 365. Second, has Congress identified a "history and pattern of unconstitutional" violations of these rights? *Id.* at 368. Third, is the federal statute "congruent and proportional to the targeted violation"? *Id.* at 374.

First, Title II is directed at preventing and remedying violations of the fundamental constitutional rights of people with disabilities which are protected by the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. In *Board of Trustees of the University of Alabama v. Garrett* and *Board of Regents v. Kimel*, 528 U.S. 62 (2000), this Court reviewed the congruence and proportionality of congressional legislation in areas that trigger only rational basis review. This case arises in a very different context. Title II is directed at deterring and compensating violations of rights that have long been regarded as fundamental. These include the right to vote, *see, e.g., Dunn v. Blumstein,* 405 U.S. 330, 336-37 (1972); the right to travel, *see, e.g., Saenz v. Roe*, 526 U.S. 489, 500 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); the right to be free from unjustified confinement, *see, e.g., Youngberg v. Romeo*, 457 U.S. 307, 384-388 (1982); the right to marry, *Zablocki v. Redhail*, 434 U.S. 374, 384-88 (1978), to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942), and to have custody of one's children, *Stanley v. Illinois,* 405 U.S. 645, 651-53 (1972).

Second, Congress, as a basis for enacting Title II, extensively documented pervasive constitutional violations against people with disabilities with regard to each of these rights, as well as in many other areas where access to basic government services, programs, and activities was unconstitutionally denied. The text of Title II expressly states congressional findings that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and

access to public services." 42 U.S.C. § 12101(a)(3). Congress, within the statute itself, characterized the discrimination against individuals with disabilities as "pervasive" throughout the nation. 42 U.S.C. § 12101(a)(2). In extensive hearings and Commission reports, Congress repeatedly detailed and often quantified extensive unconstitutional acts against individuals with disabilities with regard to fundamental rights. Congress also found arbitrary and irrational discrimination against the disabled in every facet of government services, programs, and activities, including licensing, the focus of this case. 42 U.S.C. § 12101(a)(5) ("exclusionary qualification standards" are a continuing form of discrimination against people with disabilities.)

Finally, Title II is "proportionate" and "congruent" to preventing and remedying the constitutional violations that Congress documented. The law "[r]espond[s] to a history of widespread and persisting deprivation of constitutional rights." *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 640 (1999). It does so in a carefully calibrated fashion. Title II is limited to protecting individuals who are "otherwise qualified," 42 U.S.C. § 12132(b)(5)(A)-(B), by virtue of "meet[ing] the essential eligibility requirements for . . . the participation in the programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The statute is narrowly tailored in that it requires only that the government act "reasonably." Title II is explicit that public entities are not required to make modifications that are unreasonable. *Olmstead v. L.C.*, 527 U.S. 581, 603 (1999). Indeed, it is difficult to imagine any narrower statute that Congress could have written to address the pervasive constitutional violations that it found to exist across the country.

ARGUMENT

STATE GOVERNMENTS MAY BE SUED FOR VIOLATING TITLE II OF THE AMERICANS WITH DISABILITIES ACT BECAUSE THE LAW IS PROPORTIONATE AND CONGRUENT TO PREVENTING AND REMEDYING CONSTITUTIONAL VIOLATIONS BY STATE GOVERNMENTS

A. The Inquiry: Is Title II a Proportionate and Congruent Means to Prevent and Remedy Constitutional Violations?

This Court has held that "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. at 363 (citation omitted). The Americans with Disabilities Act unequivocally authorizes suits against state governments. The Act states: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in a Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

The issue in this case therefore is whether this authorization of suits against states is constitutional; that is, whether Title II lies within the scope of Congress's power under section five of the Fourteenth Amendment. In a series of recent decisions, this Court has held that a statute constitutes an appropriate enactment under section five, and thus may be used to sue state governments, where Congress has documented a pattern of unconstitutional conduct by the states, and where the remedy provided by Congress is congruent and proportionate to the scope and nature of the identified constitutional violations. *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. at 374; *Kimel v. Florida*

Board of Regents, 528 U.S. at 81-82; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. at 639-40; *City of Boerne v. Flores,* 521 U.S. 507, 520, 525 (1997).

The State of California seeks to materially change the inquiry so as to ask only whether "Congress exceeded its Fourteenth Amendment powers with respect to the specific activity at issue—professional and vocational licensing—rather than considering Title II of the ADA in toto." Pet. Br. at 14. In other words, the State argues that the question is not whether Title II of the ADA is within the scope of Congress's section five powers, but instead, whether the prohibition of discrimination against individuals with disabilities in medical licensing is a lawful exercise of Congress's authority under the Fourteenth Amendment based on the legislative history of the ADA. The State's proposed approach would significantly change the law and impose dramatic and inappropriate new limits on congressional authority.

First, the State's proposed approach misconceives the question. The issue is whether this statute, Title II of the ADA, is within the scope of Congress's section five authority. No decision of this Court—or any court—ever has held that a constitutional statute cannot be used for a specific application clearly embraced within the law unless Congress made specific findings as to that particular application. Indeed, in each of its recent cases concerning whether a federal law can be used to sue state governments, this Court always has focused on whether the statute, not just a particular application of the law, fits within Congress's section five powers. *See, e.g., Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. at 364 (emphasis added) ("Accordingly, the ADA can apply to the States only to the extent that the *statute* is appropriate § 5 legislation.")

Second, the State's approach, requiring that each form of discrimination and violation of rights prohibited by the law be

specifically documented by Congress to involve pervasive constitutional violations, would greatly and unduly limit Congress's authority. This Court has emphasized that "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *City of Boerne v. Flores*, 521 U.S. at 536 (citation omitted). This power would be vastly reduced if an otherwise constitutional law could be applied only to the specific areas that Congress explicitly identified and proved to be subject to pervasive discrimination.

Under the State's approach, a law that was otherwise clearly constitutional under Congress's section five powers could not be applied even against unquestionably unconstitutional state conduct if Congress had not proven pervasive unconstitutional actions as to that precise type of conduct. For example, if Congress found and thoroughly documented widespread race discrimination by state governments and enacted a law prohibiting states from discriminating based on race in their services, programs, or activities, that law could not be applied against race discrimination in medical licensing or any other area without specific Congressional findings as to each and every application. New activities of state governments, not existing or foreseen at the time a statute was adopted, could not be regulated under the law, even where the broad subject area was encompassed by the law's proscriptions and was otherwise supported by sufficient congressional findings.

The State's formulation is irreconcilable with this Court's repeated holding that Congress, when acting under section five, can go further than just what the Constitution prohibits. As this Court has stated: "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that

which is not itself forbidden by the Amendment's text." *Trustees of the University of Alabama v. Garrett*, 531 U.S. at 365 (citation omitted); *Kimel v. Florida Board of Regents*, 528 U.S. at 81; *City of Boerne v. Flores*, 521 U.S. at 536. This Court has stressed that Congress may act under section five to prevent and remedy constitutional violations "even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the states." *Lopez v. Monterey County*, 525 U.S. 266, 282-83 (1999) (citation omitted). But if the State's argument were accepted, Congress broad remedial powers would be negated and laws would be limited only to constitutional violations and only to those proven in the legislative history.

Finally, the State's argument would necessarily require the judiciary to make an arbitrary choice as to the level of abstraction at which to state the inquiry. Under the State's approach, should the focus be on whether Congress found pervasive discrimination in licensing of doctors; or licensing of all health professionals; or licensing of all professionals; or all who receive licenses from the State; or all who receive benefits from the State?

States would always argue for the level of specificity required to avoid being covered by congressional findings of prior discrimination. If successful, this gambit could preclude statutory liability even in a field—somewhat more broadly defined—where the history of state discrimination is glaring and thoroughly documented. This is because Congress never makes specific findings of the kind demanded by the Petitioner at the level of detail that Petitioner also insists that the Constitution requires. For the Court to impose such a requirement on Congress would raise serious separation of powers concerns. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasizing that it is not for the courts "to judge the wisdom, fairness or logic of

legislative choices.") At the very least, the State's approach, having this Court focus only on whether discrimination against individuals with disabilities in medical licensing is within the scope of Congress's section five powers, would significantly change the law and would be the antithesis of the "judicial avoidance" urged by the Medical Licensing Board. Pet. Br. at 15, citing *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander v. T.V.A.*, 297 U.S. 288, 345-348 (1936) (Brandeis, J, concurring).

The Amicus Brief filed by Commonwealth of Virginia would go even further in limiting Congress's powers. The Amicus Brief contends that the "examination of Congressional findings should be limited to the statutory text." Brief of the Commonwealth of Virginia, at 6. The claim is that Congress must put findings of pervasive discrimination in the text of the statute itself or forfeit its section five authority. *Id.* at 8. This, too, is an approach lacking support from any prior decision of this Court or any other court. In each recent case concerning the scope of Congress's section five powers, this Court has reviewed the legislative history to determine whether Congress documented pervasive discrimination and whether the statute was proportionate and congruent as a preventative and remedial measure. In *Kimel v. Florida Board of Regents,* 528 U.S. at 88, this Court explained that "[o]ne means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action."

Under the ruled urged by Amicus, scarcely any federal law would fall within the scope of section five because statutory provisions regulate conduct; text rarely comes packed with detailed findings in support of itself. The Amicus brief takes general discussions about the role of legislative history in statutory interpretation and applies them to a very different context where they have no relevance: whether Congress

found a sufficiently pervasive pattern of unconstitutional action to justify a statute under section five of the Fourteenth Amendment.

Moreover, the ADA is unusual among federal laws in that Congress did include within it explicit findings about widespread discrimination against individuals with disabilities by state and local governments in their services, programs, and activities. The ADA declares Congress's finding that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). The statute itself states that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). The ADA, in its statutory provisions, is quite specific as to the forms of unconstitutional discrimination against Americans with disabilities:

> [Persons with disabilities] encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities. 42 U.S.C. § 12101(a)(5).

Based on these findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the Fourteenth Amendment" as the basis for enacting the ADA. 42 U.S.C. § 12101(b)(4).

The Virginia Amicus Brief also advances another novel argument to limit Congress's powers: that a federal law preventing and remedying discrimination can be applied only to those states that Congress specifically finds have engaged in unconstitutional conduct. Virginia Amicus Br. at 11. This would require Congress, in acting under section five, to study every state and to make specific findings of discrimination as to each and every state. Again, nothing in any decision of this Court or any court provides support for such a limit which would enormously restrict the ability of Congress to act under section five of the Fourteenth Amendment. Quite the contrary, this Court has been clear that if Congress finds pervasive constitutional violations, it may adopt a law with national application to prevent and remedy the problem so long as the law is proportionate and congruent. *See Oregon v. Mitchell,* 400 U.S. 112, 147 (1970) (Douglas, J., concurring); 216 (Harlan, J., concurring); 236 (Brennan, J., concurring); 283-84 (Stewart, J., concurring) (eight Justices concluded that Congress may enact prophylactic legislation that applies nationally under section five even though Congress lacks evidence that every state has or is likely to engage in unconstitutional behavior). Indeed, the position of the Virginia Amicus would be quite offensive from the perspective of federalism, as Congress, in order to legislate, would have to make detailed findings about each state and label each a constitutional violator.

Nor is there any support for the contention of the Virginia Amicus that Congress must restrict laws properly enacted under section five of the Fourteenth Amendment to a limited period of time. Virginia Amicus Brief, at 12. This Court, for example, has upheld Title VII of the 1964 Civil Rights Act as valid legislation under section five even without any limit in terms of the law's duration. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *see also Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding provisions of the Voting Rights Act as valid under section five without any limit in duration). Nor

does the State provide any basis for implementation of such a requirement. Would Congress have to renew the findings every six months or every year or every five years?

The approach urged by the Medical Licensing Board and its amicus is a thinly veiled attempt to prevent Congress from legislating under section five at all. Taken together, they would require that the *text* of a statute detail findings of unconstitutional actions for *every* application and for *each* state being regulated. Such arbitrary limits on Congress's power have no basis under section five of the Fourteenth Amendment, principles of Article III, or the system of separation of powers envisioned by the Constitution.

In *Garrett*, this Court prescribed the inquiry to be followed in determining whether Title II of the ADA is within the scope of Congress's section five powers: "[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States, which violates the Fourteenth Amendment, and the remedy imposed by Congress must be proportionate and congruent to the targeted violation." 531 U.S. at 374. Therefore, the key questions in this case are: Is there a pattern of unconstitutional discrimination against individuals with disabilities by state governments in their services, programs, or activities? Is Title II of the ADA a proportionate and congruent means to prevent and remedy these constitutional violations?

B. Title II Was Enacted To Prevent and Remedy Pervasive Constitutional Violations By State Governments

1. *Title II Prevents and Remedies Discrimination Against Individuals with Disabilities in the Exercise of Fundamental Rights*

In. *Garrett*, this Court stated that "[t]he first step in applying these now familiar principles is to identify with some precision the scope of the constitutional right at issue."

531 U.S. at 365. Title II of the Americans with Disabilities Act is a response to pervasive discrimination against individuals with disabilities in the exercise of many constitutional rights that warrant heightened scrutiny under long-standing decisions of this Court. As described above, the text of the ADA is clear that the law is directed at unconstitutional government conduct in areas implicating basic rights "in such critical areas as . . . education, . . . communication, . . . institutionalization, . . . voting, and access to public services." 42 U.S.C. § 12101(a)(3).

In *Kimel*, 528 U.S. at 83, and *Garrett*, 531 U.S. at 366, the Court emphasized that it was dealing with types of discrimination, age and disability, that receive only rational basis review under equal protection in the context of employment decisions by a state. In contrast, discrimination with regard to fundamental rights—a central focus of Title II of the ADA—triggers strict scrutiny. This Court long has held that "classifications affecting fundamental rights are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

For example, countless cases hold that discrimination with regard to voting, an express concern of Congress in enacting Title II, warrants strict scrutiny. *See, e.g., Dunn v. Blumstein,* 405 U.S. 330, 334-35 (1972); *Reynolds v. Sims,* 377 U.S. 533, 565-68 (1964). Likewise, infringements of the right to travel for individuals with disabilities, another explicit area identified by Congress in Title II, receive strict scrutiny. *See, e.g., Shapiro v. Thompson*, 394 U.S. at 638 (since "the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.")

Congress in adopting Title II also sought to prevent and remedy the unjustified institutionalization of individuals with disabilities and the violation of the fundamental right to be free from unreasonable confinement. *See Olmstead v. L.C.*, 527 U.S. 581 (1999); *Youngberg v. Romeo*, 457 U.S. 307

(1982). As described below, Congress found extensive discrimination against people with disabilities in the exercise of basic liberties, such as the right to marry, the right to procreate, and the right to custody of their children, which also warrant strict scrutiny. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978) (the right to marry as a fundamental right); *Stanley v. Illinois*, 405 U.S. 645 (1972) (the right to custody of one's children as a fundamental right); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (the right to procreate as a fundamental right).

Most profoundly, Title II is about ensuring that Americans with disabilities have the same access to their government as all other citizens. In many contexts, this Court has recognized the fundamental importance of every person having access to his or her government. *See, e.g., Romer v. Evans*, 517 U.S. at 633 (declaring that it is "[c]entral both to the rule of law and to . . . equal protection" that the government be available on an equal basis "to all who seek its assistance"); *McDonald v. Smith*, 472 U.S. 479 (1985) (the right to petition government for redress of grievances); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (right of access to the courts). By prohibiting discrimination against individuals with disabilities in "services, programs, or activities," Title II, above all, is concerned with ensuring that individuals with disabilities have full and complete access to their governments.

2. *Congress Documented a Pervasive Pattern of Historic and Continuing Unconstitutional Discrimination Against Individuals with Disabilities in Government Services, Programs, and Activities*

In *Garrett*, this Court stated: "Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination." 531 U.S. at 368. As Justice Kennedy explained: "The predicate for

money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity." *Id.* at 376 (Kennedy, J., concurring).

Title II is fundamentally different from Title I, considered in *Garrett*, because Congress made express findings, supported by extensive documentation, of "pervasive" unconstitutional discrimination against individuals with disabilities in government services, programs, and activities. 42 U.S.C. § 12101(a)(2). Indeed, in *Garrett,* this Court contrasted the lack of a documented history of discrimination in employment by the states (the focus of Title I), with the congressional record detailing discrimination by the states in providing public services (Title II). 531 U.S. at 371 n.7 (observing that "the overwhelming majority of these accounts of constitutional violations by the States concern "discrimination by the States in the provision of public services and accommodations.")

In *Garrett,* this Court emphasized that "had Congress truly understood this information [concerning employment discrimination] as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of the conclusion in the Act's legislative findings. There is none." *Id.* at 371. In clear contrast, Congress made express findings of persistent discrimination in "public services." 42 U.S.C. § 12101(a)(3). Unlike employment, where Congress made a finding for private employment, but no analogous finding for public employment, 531 U.S. at 371, the text of Title II includes explicit findings of persisting discrimination in "education, . . . institutionalization, . . . voting, and access to public services." 42 U.S.C. § 12101(a)(3).

The legislative history which the Court found lacking for Title I is altogether different for Title II, in that it contains extensive documentation of widespread state government

discrimination against Americans with disabilities with regard to government services, programs, and activities. The Court recognized exactly this distinction in *Garrett*. As Justice Breyer observed in his dissent in *Garrett*, "[t]here are roughly 300 examples of discrimination by state governments themselves in the legislative record [of the ADA]." 531 U.S. at 379 (Breyer, J., dissenting). But the Court's opinion in *Garrett* responded that "[t]he overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Title II and III of the ADA." 531 U.S. at 370 n.7. In other words, the *Garrett* Court found that the vast majority of Congress's specific evidence of discrimination supported Titles II and III as valid exercises of Congress's authority under section five of the Fourteenth Amendment.

In enacting Title II, Congress exercised its unique institutional capacity "to amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey*, 380 U.S. 63, 66-67 (1965). The ADA was the result of more than 20 years of hearings and investigations into the pervasive discrimination against individuals with disabilities. With respect to the ADA alone, Congress held 16 committee hearings and 63 field hearings, issued five committee reports, and engaged in prolonged floor debate. S.Rep. No. 116, 101st Cong., 1st Sess., 4-5, 8-9 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. II at 24-28, 31 (1990). After two years of fine-tuning in committee and floor deliberations, the ADA was passed a vote of 91-6 in the Senate and 377-28 in the House.

Congress, in enacting the ADA, found that, both historically and now, individuals with disabilities are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid Postsecondary Ed. Bd. v. College Savings Bank*, 527 U.S. at 645; (the "propriety of any § 5 legislation must be judged with reference to the historical

experience . . . it reflects" *id.* at 640.) For example, with regard to voting, Congress heard that "in the past years people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent." 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1220 (1990) (hereafter, "Legis. Hist.") The legislative history documents that many persons with disabilities "cannot exercise one of [the] most basic rights as an American" because polling places were not accessible to persons with disabilities. S.Rep. No. 116 at 12. In fact, a study found that 21% of polling places were inaccessible to individuals with disabilities in the 1988 elections and 27% were inaccessible in the 1986 elections. Federal Election Commission, *Polling Place Accessibility in the 1988 General Election* 7 (1989). A hearing on discrimination with regard to voting is filled with specific examples of individuals with disabilities being denied their constitutionally guaranteed right to vote. *Equal Access to Voting for Elderly and Disabled Persons,* Hearings Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. (1984).

Overall, the United States Civil Rights Commission, in a report extensively relied on by Congress in enacting the ADA, found that people with disabilities are "frequently denied . . . the right to vote" and face barriers such as "state laws restricting voting rights of mentally handicapped persons," "the denial of opportunity for institution residents to vote," "architectural barriers at polling places," the "absence of assistance in ballot marking," the "inequity of absentee ballots," and "restrictions on rights of handicapped persons to hold public office." Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* 40 (1983); *see also* 135 Cong. Rec. S10753 (daily ed. Sept. 7, 1989) (Sen. Gore) (summarizing testimony and concluding "[a]s a prac-

tical matter, many Americans with disabilities find it impossible to vote.")

Similarly, Congress documented that those with disabilities were frequently unconstitutionally deprived of their right of access to the courts and to their government. The legislative history documents that "[t]he courthouse door is still closed to Americans with disabilities—literally." 2 Legis. Hist. 936 (Sen. Harkin). More generally, the legislative history carefully shows that government buildings, including courthouses, were inaccessible to individuals with disabilities, thus denying their basic right of access to government. The Civil Rights Commission's study found that 76% of State-owned buildings were inaccessible to persons with disabilities. Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* at 39. Congressional committees heard testimony of "innumerable complaints regarding lack of access to public service—people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building." *Americans with Disabilities Act of 1989,* Hearings on S.933 Before the Sen. Comm. on Labor and Human Res. And the Subcomm. on the Handicapped, 101st Cong., 1st Sess. (1989) (testimony of Illinois Attorney General Neil Hartigan). The legislative history, especially the field hearings, is replete with examples of individuals who could not attend court hearings or government meetings because entrances were not accessible for individuals with disabilities. *See, e.g.,* Alabama submission, at 17; Alaska submission, at 73; Indiana submission, at 626; Wisconsin submission, at 1758; Wyoming submission, at 1786. These are examples of clearly unconstitutional acts of state and local governments in denying individuals with disabilities access to their government.[3]

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[3] In *Garrett*, this Court held that examples of employment discrimination by local governments were not relevant in assessing whether

A particularly important example of pervasive unconstitutional state government actions that motivated the enactment of the ADA is the impermissible confinement of individuals with disabilities. The legislative history of the ADA recounts numerous instances of individuals with disabilities being unconstitutionally confined and institutionalized. Indeed, the "Findings and Purposes" section at the beginning of the ADA, 42 U.S.C. § 12101(a)(2)(3), mentions persistent unjustified "institutionalization" of people with disabilities. The Senate Report on the ADA explains that "[h]istorically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society." S.Rep. No. 116 at 6. Senator Harkin, in introducing the ADA, said that one of its key purposes is "getting people . . . out of

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there was an adequate record of discrimination by state governments. 531 U.S. at 368-369. However, in assessing discrimination in government services, programs, and activities, this Court should consider evidence of constitutional violations by local governments because often local governments are acting as arms of the state government in providing particular services, programs, and activities. *See, e.g., McMillian v. Monroe County*, 520 U.S. 781, 795 (1997) (Alabama county sheriff is a part of the state); *Pennhurst State School & Hospital v. Halderman*, 485 U.S. 89, 124 (1984) (administration of mental hospital by local government is a state government function); *Belanger v. Madera Unified School Dist.*, 963 F.2d 248 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) (California school districts are arms of the state and protected by the Eleventh Amendment). Many of the government functions covered by Title II devolve to local governments because states delegate these tasks. Congress surely would not need to examine the laws of each state to determine when the local government was operating as a part of the state. Rather, in this area, findings of local government violations of the constitutional rights of people with disabilities should be considered in evaluating the overall proof of pervasive discrimination. Also, it should be noted that the vast majority of areas considered—voting, access to courts and government buildings, impermissible confinement, violations of the rights to marry, procreate and custody, and licensing—involve *state* governments.

institutions." 135 Cong. Rec. S4986 (daily ed. May 8, 1989); *see also* 136 Cong. Rec. H2477 (daily ed. May 17, 1990, Congressman Miller, co-sponsor of the ADA) ("[s]ociety has made [people with disabilities] invisible by shutting them away in segregated facilities.")

The report of the United States Commission on Civil Rights, quoted extensively in the House and Senate Reports, discussed in detail the unconstitutional confinement of individuals with disabilities. The Civil Rights Commission described how historically individuals with disabilities have been needlessly isolated from the rest of society and confined, first at the hands of people who collected fees for their care and "locked their charges in the attic to starve or freeze to death;" then in unsanitary and overcrowded almshouses that generally did not provide care but were "merely custodial"; then in large state facilities that came to see their purpose as protecting society from people with disabilities as these individuals came to be seen as "sub-standard human creatures" and "waste products" during the growth of the eugenics movement. *Id.* at 17-20. The Civil Rights Commission report detailed the continuing unnecessary segregation and institutionalization of people with disabilities: "The harshest side of institutionalization is the systematic placement of handicapped people in substandard residential facilities, where incidents of abuse by staff and other residents, dangerous physical conditions, gross underfunding, overuse of medication to control residents, medical experimentation, inadequate and unsanitary food, sexual abuses, use of solitary confinement and physical restraints, and other serious deficiencies and questionable practices have been reported." *Id.* at 41.

Despite repeated calls for deinstitutionalization and integration of people with disabilities in society, widespread confinement continued. The Civil Rights Commission found: "Despite such initiatives, a great many handicapped persons

remain in segregative facilities. The Comptroller General has estimated that about 215,000 persons were residing in public mental hospitals in 1974 and that some 181,000 persons were in public institutions for mentally retarded people as of 1971. In 1976, one study estimated that 1,550,120 people were in long term residential care facilities." *Id.* at 35. This Court, of course, has found that individuals with disabilities have a fundamental right to freedom from undue restraint. *Youngberg v. Romeo*, 457 U.S. at 324 (also recognizing a right to minimally adequate treatment); *see also O'Connor v. Donaldson*, 422 U.S. 563 (1975). The legislative history of Title II describes investigations of State-run mental health facilities which found conditions that "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief." 132 Cong. Rec. S5914 (1986) (Sen. Kerry).

Congress also intended Title II to prevent and remedy violations of fundamental rights to marry, to procreate, and to custody of one's children. Congress was acutely aware of the tragic history of the eugenics movement in which states attempted to halt reproduction of people with disabilities and "nearly extinguish their race." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 462 (1985) (Marshall, J., concurring). In fact, almost every state prohibited marriage and inflicted forced sterilization on individuals with disabilities. *Id.* at 463. *See Buck v. Bell,* 274 U.S. 200, 207 (1927) (upholding compulsory sterilization "in order to prevent our being swamped with incompetence" and because "three generations of imbeciles is enough.")

Nor were such violations of the basic rights to marry and procreate a thing of the past. The Civil Rights Commission report relied on by Congress noted that fifteen states continued to have compulsory sterilization laws on the books, four of which included persons with epilepsy. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 37. Congress was aware that such abhorrent

practices continued. *See Stump v. Sparkman,* 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year-old girl). The Commission also found that "[m]any states restrict the rights of physically and mentally handicapped people to marry." Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities,* at 40.

The legislative history describes how "[h]istorically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent." 2 Leg. Hist. 1611 n.10 (Arlene Mayerson). The House Report described discriminatory policies against individuals with disabilities in "securing custody of their children." H.R. Rep. No. 485, at 41. The Civil Rights Commission found that many parents with disabilities "have had custody of their children challenged in proceedings to terminate parental rights and in proceedings growing out of divorce." Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* at 40.

Yet another area where Congress found pervasive unconstitutional treatment of individuals with disabilities was with regard to police conduct. The legislative history of Title II is filled with examples of police violating the rights of people with disabilities. The legislative history describes how persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, at 50. Countless examples exist of situations such as police in Kentucky learning that an arrestee was HIV-positive and "[i]nstead of putting the man in jail, officers locked him inside his car to spend the night." 2 Leg. Hist. 1005 (Brenda Mason). The legislative history documented how police "do not provide crime prevention, apprehension, or prosecution because they see it as fate that Americans with disabilities will be victims." *Id.* at 1197 (Cindy Miller). To cite but one example, the

legislative history describes how the police refused to accept a rape complaint from a blind woman because she could not provide a visual identification of her assailant. New Mexico submission, at 1081.

Education is one of the most egregious areas of discrimination against individuals with disabilities and also is expressly mentioned in the "Findings and Purposes" section at the beginning of the ADA, 42 U.S.C. § 12101(a)(2)(3). This Court has spoken eloquently of how "education is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). While inequalities in the financing of education do not necessarily violate equal protection, *see San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the complete denial of education is unconstitutional. *Id.* at 37 ("absolute denial" of education different from inequalities in funding); *Plyler v. Doe*, 407 U.S. 202 (1982) (absolute denial of education to children of undocumented aliens who could not pay tuition unconstitutional). The legislative history of the ADA describes many examples of children being totally excluded from school because they had AIDS, 136 Cong. Rec. H2480 (daily ed. May 17, 1990) (Rep. McDermott) (describing the exclusion of Ryan White from school); or were in a wheelchair, California Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989); or had conditions such as cerebral palsy, Vermont submission, at 1635.

Indeed, the Civil Rights Commission report found that "a great many handicapped children continue to be excluded from the public schools, and others are placed in inappropriate programs," Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 29. The Civil Rights Commission concluded that this continued despite the

enactment of the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400, *et. seq.*, which was designed to remedy these concerns. The legislative history documents the profound consequences of this discrimination: only 29% of persons with disabilities attend college, compared to 48% of the non-disabled population. National Council on the Handicapped, *On the Threshold of Independence* 14 (1988).

In addition to finding widespread violations of fundamental rights by state governments, Congress also determined that there was pervasive irrational, unjustified discrimination against persons with disabilities in every aspect of government services, programs, and activities. The legislative history contains countless examples, such as a zoo keeper refusing to admit children with Down Syndrome "because he feared they would upset the chimpanzees," S. Rep. No. 116, *supra*, at 7, and a paraplegic Vietnam veteran being forbidden to use a public pool in New York and being told by a park commissioner, "[I]'s not my fault that you went to Vietnam and got crippled." 3 Leg. Hist. 1872 (Peter Addesso). Although, of course, there is not a fundamental right to use a zoo or a park, these governments actions are unconstitutional discrimination even under a rational basis test. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that a city's zoning ordinance which discriminated against individuals with disabilities failed rational basis review and was unconstitutional).

In fact, contrary to the assertion of the Medical Licensing Board, Pet. Br. at 16, the legislative history of Title II expressly discusses discrimination in licensing, and, in fact, the statute itself identifies "exclusionary qualification standards" as a continuing form of discrimination against people with disabilities. 42 U.S.C. § 12101(a)(5); Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* at 40; 2 Leg. Hist. at 1186 (testimony of Linda Mills.) For example, the legislative history discusses individ-

uals such as Judy Heumann who was denied a teaching license because of polio. S. Rep. No. 116, *supra*, at 7. Congress undoubtedly was aware of cases concluding that state governments had engaged in discrimination against individuals with disabilities in licensing that was so unjustified as to be unconstitutional, even assuming that no form of heightened scrutiny applies to this state function. *See, e.g., Pushkin v. Regents of the University of Colorado,* 658 F.2d 1372 (10th Cir. 1981) (doctor unconstitutionally denied a residency because of multiple sclerosis).

This brief description of the discussion of unconstitutional government action in the legislative history of the ADA only touches the surface of the pervasive violations of rights found in 16 congressional committee hearings, 63 field hearings, five committee reports, numerous reports of government commissions, and tens of thousands of pages of testimony. The description, however, is sufficient to establish that Congress found overwhelming evidence of widespread violations of the constitutional rights of individuals with disabilities, including basic rights guaranteed by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

Nor, of course, is this Court limited to just congressional findings in concluding that unconstitutional discrimination against Americans with disabilities is pervasive in state government services, programs, and activities. *Turner Broadcasting System, Inc. v. Federal Communication Commission,* 520 U.S. 180, 200, 209, 211-213 (1997) (courts may consider evidence outside the legislative record in evaluating Congress's exercise of legislative power); *Conroy v. Aniskoff*, 507 U.S. 511, 516 n.10 (1993) (courts should presume that Congress is aware of relevant legal precedents). Thus, this Court may note, as Congress undoubtedly did, the many judicial decisions declaring state violations of the rights of individuals with disabilities unconstitutional. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (finding uncon-

stitutional conditions of confinement for individuals with mental disabilities at a state institution); *Parrish v. Jackson,* 800 F.2d 600, 603 (6th Cir. 1986) (prison guard assaulted paraplegic inmate with a knife and did not provide minimal sanitation needs); *Doe v. Gallinot,* 657 F.2d 1017 (9th Cir. 1982) (unconstitutional confinement of a person with disabilities); *Cameron v. Tomes,* 990 F.2d 14 (1st Cir. 1993) (unconstitutional denial of treatment for a person with disabilities); *Panitch v. Wisconsin*, 444 F.Supp. 320, 322 (E.D. Wis. 1977) (unconstitutional discrimination in education); *Goldy v. Beal*, 429 F.Supp. 640 (M.D.Pa. 1976) (unconstitutional confinement of individuals with disabilities); *Mills v. Board of Education*, 348 F.Supp. 866, 870 (D.D.C. 1972) (unconstitutional discrimination in education); *Wyatt v. Stickney*, 344 F.Supp. 387, 391 (M.D. Ala. 1972) (finding conditions for housing individuals with disabilities "grossly substandard"); *Dixon v. Attorney General,* 325 F.Supp. 966 (M.D.Pa. 1971) (unconstitutional procedures for confining people with disabilities). This Court, prior to the enactment of the ADA, spoke of "well-catalogued instances of invidious discrimination against the handicapped." *Alexander v. Choate*, 469 U.S. 287, 295 n.12 (1985).

Unconstitutional discrimination against people with disabilities by state governments is not a relic of the past. For instance, unconstitutional violations of the right to vote of individuals with disabilities persists. *See, e.g., Doe v. Rowe*, 156 F.Supp.2d 35, 38 n.2 (D.Me. 2001) (constitutional violation in denying the right to vote to people with disabilities); *New York v. County of Delaware,* 82 F.Supp.2d 12 (N.D.N.Y. 2000) (polling places in two counties were inaccessible to individuals with disabilities). A study in 2000 found that only 27% of Philadelphia's 1,681 polling places were accessible to people with disabilities. General Accounting Office, Voters With Disabilities—Access to Polling Places and Alternate Voting Methods (2001). The study

found that overall, 84% of the polling places that it examined had at least one impediment which could hinder persons with disabilities from casting their ballot.

Likewise, courts continue to find that state governments engage in impermissible discrimination against Americans with disabilities in professional licensing. *See, e.g., Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d. Cir. 2000); *Clark v. Va. Bd. of Bar Examiners,* 880 F.Supp. 430 (E.D. Va. 1995); *In re Petition of Kara B. Rubenstein*, 637 A.2d 1131 (Del. 1994); *In re Petition of Frickey*, 515 N.W.2d 741 (Minn. 1994). *See generally,* Emily Bazar, *State Agencies Lag Badly in Complying with a 1995 Deadline to Provide Full Access,* Sacramento Bee, June 17, 2001, at A1 ("a survey of the state's [California's] 10 largest departments shows that California government clearly violates the 1990 Americans with Disabilities Act and is at least a decade away from ensuring that the public has unencumbered access to its programs and facilities.")

Nor, contrary to the Medical Licensing Board's assertion, are state laws adequate to protect the fundamental rights of Americans with disabilities. In 1990, when the ADA was adopted, 26 states failed to provide any statutory protection against state discrimination against individuals with disabilities with respect to government services and activities. Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1092, 1113 (2002). Many state laws which did exist had significant limitations. For example, the Medical Board of California boasts that "California's own statutory prohibition against discrimination in licensure on the basis of disability antedated the ADA by eight years." Pet. Br. at 28 n.9 (citing Cal. Gov. Code § 12944). However, as originally enacted in 1980, § 12944 covered only "physical handicap and medical condition" in providing protection for individuals with disabilities. It was

only in 1992, after the passage of the ADA and prompted by it, that § 12944 was amended to include mental disability protection, the focus of this case.

In fact, a recent study of laws in all 50 states found that even now, nine states have no enforcement mechanism against the state for discrimination against individuals with disabilities and only twenty-four states have statutes comparable to the protections found in Title II including the availability of monetary relief against the government. Colker & Milani, *supra*, at 1075.

Thus, by any measure, Congress documented the need for action under section five of the Fourteenth Amendment by finding pervasive constitutional violations of the rights of individuals with disabilities who often lack any meaningful remedy.

3. *Title II is Thus Distinguishable from Other Statutes that this Court has Determined to Be Outside the Scope of Congress's Section Five Powers*

Title II of the ADA is very different from Title I and from the Age Discrimination in Employment Act (ADEA), which this Court held in *Garrett* and *Kimel*, respectively, were not within the scope of Congress's section five powers. First, Title II is directed only at the government and at its basic functions as a government in providing "services, programs, or activities." Title I and the ADEA regulate employment for both government and private employers. This Court has noted the basic difference between the government acting as a sovereign as opposed to as an employer. *See, e.g., Board of County Commissioners v. Umbehr,* 518 U.S. 668, 676 (1996); *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987). When the government acts as the sole judge of fitness to practice medicine it acts in a different capacity than when it hires doctors.

A doctor rejected by one emergency room has other potential employment as a physician; a doctor denied a medical license has no recourse and no ability to practice medicine.

Second, employment discrimination against individuals with disabilities and the elderly, the focus of Title I and of the ADEA, receives only rational basis review. This was a crucial aspect of this Court's analysis in both *Garrett* and *Kimel* and a basis for the conclusion that these laws were not within the scope of Congress's section five powers. In contrast, as discussed above, Title II, in large part, is concerned with violations of the fundamental rights which trigger strict scrutiny.

Third, the legislative history for Title II is vastly different from that for Title I or for the ADEA. In *Garrett*, the Court stressed the absence of congressional findings of discrimination in employment and that there were only six examples of unconstitutional state discrimination in employment in the legislative history. 531 U.S. at 369. In sharp contrast, as detailed above, Congress, in the text of the ADA and in the legislative history, made explicit findings of pervasive unconstitutional discrimination in areas such as voting, access to government, and institutionalization. The legislative history is filled with countless examples of state governments unconstitutionally violating the rights of people with disabilities.

In all of these ways, Title II is very similar to the Voting Rights Act, which the Court in *Garrett* identified as a model of permissible legislation under section five of the Fourteenth Amendment. 531 U.S. at 373. Title II, like the Voting Rights Act, was enacted only after "Congress explored with great care the problem" of constitutional violations. *Id.* (citation omitted). In both Title II and the Voting Rights Act, "Congress documented a marked pattern of unconstitutional action by the States." *Id.* The Court in *Garrett* emphasized the statistical proof before Congress in enacting the Voting

Rights Act. *Id.* As described above, Congress had similar statistical evidence of inequalities for Americans with disabilities in areas such as voting, access to government buildings, and education. Title II, like the Voting Rights Act, is directed only at governments and is a response to "a pattern of discrimination by the states which violates the Fourteenth Amendment." *Id.* at 374.

C. Title II Is a Proportionate and Congruent Means to Prevent and Remedy Constitutional Violations

1. *The Prohibition of Discrimination Against Individuals with Disabilities in Government Services, Programs, and Activities is Proportionate and Congruent to Preventing and Remedying Pervasive Constitutional Violations Found by Congress*

Having found widespread unconstitutional state government actions against individuals with disabilities with regard to numerous basic rights, it was necessary and appropriate for Congress to prohibit discrimination in government "services, programs, or activities." Title II thus meets the requirement that this Court has imposed that legislation under section five "be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne v. Flores*, 521 U.S. at 532.

Unquestionably, Title II has a broad scope, but that is warranted—"proportionate" and "congruent"—to the pervasive constitutional violations documented in the legislative history. As this Court expressed, "[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 530. Indeed, it is difficult to imagine how Congress could have written a narrower statute to deter and remedy the

widespread unconstitutional actions found by Congress. As this Court has explained, when Congress uncovers "a significant pattern of unconstitutional discrimination," Congress has "reason to believe that broad prophylactic legislation is necessary." *Kimel v. Florida Board of Regents,* 528 U.S. at 91.

2. *Title II Is Carefully Tailored in that it Applies Just to "Qualified Individuals" Who Meet "Essential Requirements" and it Requires Only that the Government Act Reasonably*

The key question in evaluating "proportionality" and "congruence" is whether Title II was "designed to guarantee meaningful enforcement" of constitutional rights. *Garrett,* 531 U.S. at 373. Title II does exactly this. Title II prohibits *unreasonable* discrimination against people with disabilities. The States retain their discretion to exclude persons from programs, services or benefits for any lawful reason unconnected with their disability. More importantly, Title II is limited to protecting individuals who are "otherwise qualified." 42 U.S.C. § 12132(2). This is defined as an "individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . *meets the essential eligibility requirements* for the receipt of services or the participation in the programs or activities provided by a public entity." *Id.* (emphasis added). Thus, in the context of medical licensing, a state never would have to issue a license to a doctor who cannot meet the state's standards for competent performance or who, in any way, would endanger the public. *See* Laura F. Rothstein, *The Americans with Disabilities Act: A Ten Year Retrospective*, 52 Ala. L. Rev. 241, 262 (2000) ("behavior and performance deficiencies are not excused [by medical licensing boards], even if they relate to disability.") But nor can a state deny a medical license to an individual with disabilities who otherwise meets "the essential eligibility requirements," which is exactly what Dr.

Hason alleges here.[4] Title II carefully balances a state's legitimate interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

Title II therefore prohibits more than the Constitution only to the extent that some disability discrimination may be rational for constitutional purposes, but unreasonable under the statute. This difference is surely not enough for a conclusion that Title II lacks "proportionality" or "congruence," especially in light of this Court's repeated statements of the need for deference to Congress in determining whether laws are permissible under section five. *See Kimel v. Florida Board of Regents*, 528 U.S. at 81 (Court has accorded Congress "wide latitude" under section five); *City of Boerne v. Flores*, 521 U.S. at 518 (directing courts to defer to Congress on congruence and proportionality review). The difference between the Constitution and the statute is needed because "[a] proper remedy for an unconstitutional exclusion . . . aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States v. Virginia*, 518 U.S. 515, 547 (1996). A statute limited to providing a remedy for constitutional violations would not have the needed prophylactic effect of deterring government from engaging in conduct that risks infringing the rights of individuals with disabilities.

Nor does Title II's requirement for reasonable accommodation for individuals with disabilities negate it being proportionate and congruent. The Constitution itself requires that the government act to accommodate individuals with disabilities, such as in ensuring that polling places are

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[4] Obviously, if Dr. Hason prevails in this Court, that does not mean that he automatically will receive his medical license or damages. All it means is that Dr. Hason has a cause of action and his day in court. If the State can prove that Dr. Hason was not "qualified" to practice medicine, it will prevail at trial.

accessible, translators are available in court for the hearing impaired, and that necessary treatment in an appropriate setting is provided to those in a state's care. This, too, is an important distinction between Title II and Title I of the ADA. In *Garrett*, this Court emphasized that congruence and proportionality were of particular concern under Title I because "the accommodation duty [under Title I] far exceeds what is constitutionally required." *Garrett,* 531 U.S. at 372. But unlike employment, the Constitution mandates affirmative government actions to accommodate individuals with disabilities in the exercise of many fundamental rights.

Moreover, Title II requires only reasonable modifications that would not fundamentally alter the nature of the service provided and only when the individual seeking modification is otherwise eligible for the service. 42 U.S.C. § 12131(2); *Olmstead v. L.C.*, 527 U.S. at 603 (explaining that states may take into account cost and available resources in determining whether and how to accommodate individuals with disabilities under Title II). In fact, Congress expressly found that the vast majority of these accommodations entail little or no cost to the government. S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, pt. 2, at 34.

Although Title II prohibits somewhat more than just what would violate the Constitution, this Court has been clear that it is permissible for a law enacted under section five to do so. The Court has stated that Congress's power under section five "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel v. Florida Board of Regents*, 528 U.S. at 81. This Court has stressed that "[l]egislation which deters or remedies constitutional violations can fall within the scope of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Lopez v. Monterey County*, 525 U.S. at 282-283.

3. *Damage Remedies Are Needed to Deter and Compensate Violations of Constitutional Rights*

Title II has exactly the goal identified as the central purpose of legislation under section five of the Fourteenth Amendment: to prevent and remedy constitutional violations of the rights of individuals with disabilities. This Court long has recognized that damage remedies are essential to deter constitutional infringements and to provide compensation to victims of illegal action. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (emphasizing the importance of damages for deterrence and risk-spreading in the context of § 1983). Indeed, in this case, for Dr. Hason, "it is apparent that some form of damages is the only possible remedy for someone in [his] alleged position." *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 409-410 (1971). Dr. Hason's complaint alleges that he has been illegally and unconstitutionally denied a medical license for the last five years. Even if he ultimately prevails in his suit for injunctive relief and receives his license, he has forever lost five years of income and experience in serving his patients. For these five years, "it is damages or nothing." *Id.*

Nor can it be assumed that injunctive relief to enforce Title II will be available if this Court holds that Title II is outside the scope of Congress's section five powers. In *Garrett*, 531 U.S. at 374 n.9, this Court, in rejecting a damage remedy against state governments to enforce Title I of the ADA, stressed the availability of injunctive relief against individual officers pursuant to *Ex parte Young*, 209 U.S. 123 (1908). But some courts have held that individual officers may not be sued to enforce Title II. *See Walker v. Snyder*, 213 F.3d 344, 346-347 (7th Cir. 2000), *cert. denied sub nom United States v. Snyder*, 531 U.S. 1190 (2001); *Lewis v. New*

Mexico Dept of Health, 94 F.Supp.2d 1217, 1230 (D.N.M. 2000) (*Ex parte Young* actions cannot be maintained under Title II because officials are not "public entities.")

In fact, if this Court concludes that Title II is not valid under section five, states certainly will argue that, unlike Title I or the Age Discrimination in Employment Act which regulate employment in both the private and public sectors, Title II does not fit within the scope of Congress's commerce clause power. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995) (narrowing the scope of Congress's commerce clause authority). Even more troubling, if Title II is not valid as legislation under section five, then states will argue that applying its mandates to state governments raises Tenth Amendment problems. *See, e.g., Printz v. United* States, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992) (finding laws enacted under the commerce power to violate the Tenth Amendment because they required states to take legislative or regulatory actions).

The reality is that state governments are aggressively challenging every application of federal civil rights laws. States already are arguing that their officers cannot be sued for injunctive relief under Title II and that they cannot be sued under other federal statutes protecting individuals with disabilities, such as Section 504 of the Rehabilitation Act. 42 U.S.C. § 2000d. *See, e.g., Garcia v. SUNY Health Sciences Ctr. of Brooklyn,* 280 F.3d 98 (2d Cir. 2001) (limiting suits against states under the Rehabilitation Act).

Simply put, Title II is an essential federal law to prevent and remedy pervasive violations of the constitutional rights of individuals with disabilities throughout government services, programs, and activities. If Title II is deemed to be outside the scope of Congress's section five powers, the nation will lose a crucial law addressing the country's "history of unfair

and often grotesque mistreatment" of persons with disabilities. *City of Cleburne v. Cleburne Living Center,* 473 U.S. at 454 (Stevens, J., concurring) (citation omitted).

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals should be affirmed.

Respectfully submitted,

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It was ordered that this case be removed from the argument calendar on March 7, 2003.